No. 89-826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE,
a California corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITION FOR WRIT OF CERTIORARI

JERROLD A. FADEM
MICHAEL M. BERGER*
RICHARD D. NORTON

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Petitioner
FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

This case is back in this Court after this Court's remand to the California Court of Appeal. (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304) Because the California Court of Appeal responded to this Court's remand by dismissing the case as a matter of law — instead of returning it to the superior court for trial to determine whether a Fifth Amendment taking had in fact occurred — the following questions now need decision by this Court:

1. Did the California Court of Appeal violate this Court's remand order in this case when it refused to have a trial court determine what the facts are and whether those facts are a Fifth Amendment taking?

2. Did the California Court of Appeal deny Petitioner due process of law when, instead of ordering a trial to determine the facts in this case, the Court of Appeal took selective judicial notice (over Petitioner's objections) of a few documents from the County's planning files and used the judicially noticed materials to "prove" the facts needed to support dismissal, thereby — for a second time — dismissing this case on its pleadings without fact finding?

3. Can a land use regulation adopted for a proper purpose violate the Fifth Amendment's Just Compensation Clause if it takes private property for public use without compensation?

4. Does a land use regulation violate this Court's standard for a taking (*i.e.*, deprivation of "economically viable use") when the regulation prohibits construction of buildings but the Court of Appeal concludes that economic uses are available to the property owner because: "[m]eals could be cooked, games played, lessons given, tents pitched" (App A, p 18)?

Can it be determined that a regulation permits "economically viable use" without a trial and evidence?

5. Does a land use regulation violate this Court's alternative standard for a taking (*i.e.*, interference with "reasonable, investment-backed expectations") when the regulation prohibits any attempt to redevelop the property for its historic retreat and conference center use after its destruction in an unusually large storm?

Can it be determined whether a regulation interferes with "reasonable, investment-backed expectations" without a trial and evidence?

6. Did the California Court of Appeal's abject acceptance of the County's rationalizations for its regulation at face value, rather than subjecting them to a more stringent standard of review because they take significant property interests from Petitioner violate the standards established by this Court in *Nollan v. California Coastal Commn.* (1987) 483 US 825?

7. In light of this Court's holding in *Nollan* that property owners have a *right* to build on their property, subject only to reasonable regulation, did the California Court of Appeal violate this Court's standards when it upheld the County's ordinance because it "only" prohibits construction or reconstruction of buildings? (App A, p 18)

PARTIES TO THE PROCEEDING

All parties to this Petition are listed in the caption.

TABLE OF CONTENTS

Page

Page

Page

LIST OF APPENDICES

TABLE OF AUTHORITIES

Statutes

Constitution

Page

Publications

Page

PETITION FOR WRIT OF CERTIORARI

The Petitioner (First Church) respectfully prays that a Writ of Certiorari issue to review a judgment of the California Court of Appeal, Second Appellate District, Division Seven.

OPINIONS BELOW

The decision of the Court of Appeal (App A) is reported at 210 Cal App 3d 1353. The order modifying the opinion and denying rehearing (App B) was not separately published.

Chief Justice Lucas and Justices Panelli and Kaufman voted to grant review, but the California Supreme Court denied review. The order of the California Supreme Court denying review (App C) was not published.

The proceedings in the California courts before this Court's 1987 decision in this case appear in this Court's file in case no. 85-1199.

JURISDICTION

In this Court's 1987 decision in this case (described by commentators on both sides of the issue as a landmark and blockbuster,[1] the centerpiece of this Court's recent takings

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[1] *Commentary* (1987) 39 Land Use Law & Zoning Digest, no 8 at 3; Bauman, *A True Landmark Decision* (1987) 39 Land Use Law & Zoning Digest, no 8 at 3; Bauman, *The Supreme Court Becomes Serious About Takings Law: The First Church, Keystone and Irving Cases* (1987) 10 Zoning & Planning L. Rep. 145, 146; Falik & Shimko, *The Takings Nexus: The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California* (1988) 39 Hast. L.J. 359; Freilich, Francis & Popejoy, *State and Local Government at the Crossroads: A Bitterly Divided Supreme Court*

(continued)

decisions,[2] and the most significant land use decision in the last 50 years[3]), this Court struck down, as contrary to the Fifth Amendment, California's rule (from *Agins v. City of Tiburon* [1979] 24 C 3d 266) that the only remedy for one whose property is taken by a government regulation is invalidation of the regulation.

In the case at bench (before this Court's 1987 decision), the trial court struck the regulatory taking allegations from the complaint because of the *Agins* rule. Thus, after this Court annulled the *Agins* rule and established the Constitutionally required remedy as compensation, this Court remanded this case to the California courts to determine whether the *facts* showed a taking which required compensation.

Two years later, the Court of Appeal concluded — *without* trial, and thus *without* any factual record (the record is only the complaint and a motion to strike allegations from it) — that the *facts* do not show a taking. Thus — for a second time — the Court of Appeal denied First Church a trial on its taking claim.

This Court's 1987 decisions in this case and in *Nollan v. California Coastal Commn.* (1987) 483 US 825 seemed intended to inform the California courts that they had not

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(ftn. continued)
Reevaluates Federalism in the Bicentennial Year of the Constitution (1987) 19 The Urban Lawyer 791, 794; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L.J. 335, 344; Pollot, *The Effect of the Federal Takings Executive Order* (1989) 41 Land Use Law & Zoning Digest, no 5 at 3; Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence* (1988) 49 Ohio St. L.J. 591, 598; Note (1988) 10 Campbell L. Rev. 275.

[2] Siemon & Larsen, *The Taking Issue Trilogy: The Beginning of the End?* (1988) 33 J. Urb. & Contemp. L. 169, 170, 181.

[3] Falik & Shimko, 39 Hast L.J. at 1; *see* Note, 10 Campbell L. Rev. at 292.

provided the protections given property owners by the Fifth Amendment. The result below shows that the California courts do not yet appear to have received this Court's message. Instead, the California courts continue on their own course, gambling that this Court will not have the time to correct their wilfull defiance.

Because of:

- the importance of the legal issues in the remand from this Court's 1987 decision,
- the Court of Appeal's erroneous denial of trial and application of legal precepts which conflict with clear holdings of this Court in this and other cases,
- the Court of Appeal's erroneous determination of fact issues without any factual record, and
- the subversion of this Court's decision in this case,

First Church prays that Certiorari be granted and the judgment as to the regulatory taking cause of action be reversed for trial to determine whether the facts in this case require enforcement of the legal remedy established by this Court in this case.

The Court of Appeal's decision on remand from this Court was filed May 26, 1989 (App A) and modified June 23, 1989 when rehearing was denied (App B). Three California Supreme Court Justices, Chief Justice Lucas and Justices Panelli and Kaufman, voted to grant review, but the timely Petition for Review was denied by the California Supreme Court August 25, 1989. (App C)

This Court's jurisdiction is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent Los Angeles County ordinances are in App D.

STATEMENT OF THE CASE

This case involves what used to be a conference center, called Lutherglen, maintained for two decades by First Church on 21 acres it owns in the mountains north of the City of Los Angeles. The conference center was a place for meetings, retreats, recreation, and camping.

In 1978, extraordinary storm runoff during an unusually severe storm (and after fire denuded the watershed, eliminating its water retention capability) caused a creek which runs through the property to overflow, destroying all the camp's buildings.

Immediately after the storm, the County adopted Ordinance no. 11855, temporarily prohibiting any construction in the area. Two and a half years later, the temporary prohibition was made permanent. (App D contains both ordinances.)

First Church sued the County and the County Flood Control District a month after the adoption of the temporary ordinance. The only cause of action at issue on this Petition is First Church's claim that the prohibition of any construction is a taking of all economically viable use of the property

within the meaning of the Fifth Amendment's Just Compensation Clause, as applied through the Fourteenth Amendment. (See 482 US at 313, fn 8.)

The effect of the ordinance is to convert Lutherglen into part of the channel which collects mountain runoff and transports the water to a downstream reservoir for storage.

Before this Court's 1987 decision in this case, the trial court granted the County's motion to strike all allegations about the ordinance on the ground that the California Supreme Court's decision in *Agins* forbade *any* action for compensation for a regulatory taking of property.[4]

The Court of Appeal affirmed, the California Supreme Court denied review, and this Court took jurisdiction of the appeal and remanded, holding that *Agins* violated the Fifth Amendment because the Fifth Amendment requires compensation for all governmental takings. The case was remanded so the California courts could determine whether the *facts* of this case entitle First Church to the remedy held available by this Court in this case.

Instead of remanding for trial to determine what the facts actually are, the Court of Appeal concluded that the facts (present in the record only in the form of a complaint and a motion to strike) could not state a cause of action. (App A)[5]

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[4] When the temporary ordinance was replaced by a permanent ordinance two and a half years later, First Church did not amend its complaint to so allege because *Agins* would have made it a futile gesture. As the trial court had already held, no action seeking compensation for a regulatory taking could then have been pled. After this Court's decision in this case compelled recognition of the cause of action for the first time, First Church told the Court of Appeal that it planned to ask leave on remand to the trial court (where pleadings can be amended) to amend its complaint to so allege, as *Agins* is no longer a bar.

[5] Over First Church's repeated objections, both before and after filing its decision (see Pet for Rehearing 7), the Court of Appeal took selective judicial notice of documents from the County's files.

(continued)

First Church's timely Petition for Rehearing was denied (App B), as was its Petition for Review in the California Supreme Court (App C), although Chief Justice Lucas and Justices Panelli and Kaufman voted to grant review.

RAISING THE FEDERAL QUESTIONS

When this case was before the trial court (before this Court's 1987 decision in this case), *no* substantive taking issues under the Fifth Amendment were argued, although the issues were pled in the complaint. On its first trip through the California court system, the *only* issue briefed and argued at any level was the *remedy* question of whether the Fifth Amendment required compensation for a regulatory taking.

After this Court decided the remedy issue in First Church's favor in 1987, the substantive taking issues were then ready for trial.

The substantive issues raised in this Petition were raised and argued in supplemental briefs ordered by the Court of Appeal after this Court's remand. The Court of Appeal's constitutionally erroneous resolution of those issues was raised in the Petition for Rehearing in the Court of Appeal and in the Petition for Review in the California Supreme Court.

The federal questions are properly before this Court.

(ftn. continued)
(App A, pp 19-22) That selective judicial notice — of only documents which supported the County but not documents requested by First Church which would have made clear the factual conflict and need for a trial — instead of remanding for trial court evaluation of *all* the facts, deprived First Church of the ability to have a full and fair trial and a decision based on evidence, in violation of First Church's due process rights under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEAL DEFIED THIS COURT'S INSTRUCTION TO PERMIT A FACTUAL DETERMINATION OF WHETHER A TAKING HAD OCCURRED. PURSUING ITS WILFULL AND IDIOSYNCRATIC COURSE, THE CALIFORNIA COURT OF APPEAL PERMITTED THE COUNTY TO "PROVE" ITS CASE BY JUDICIAL NOTICE AT THE APPELLATE LEVEL, THEREBY DENYING FIRST CHURCH DUE PROCESS OF LAW

The Court of Appeal's decision violates the plain intent of this Court's 1987 decision in this case that there be a factual, evidentiary inquiry to determine whether the County's actions violated the Fifth Amendment's Just Compensation Clause.

Based on the *same* facts which were before the Court of Appeal, this Court said:

> ". . . we . . . hold that *on these facts* the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 US at 310-311; emphasis added.)

Based on *no additional facts*, the Court of Appeal dismissed the case without trial. When this Court issued its opinion based ". . . on these facts . . ." it envisioned a trial to determine what lay behind ". . . these facts . . ." as alleged in the complaint.

Fact determination is the province of trial — not appellate — courts.

However, instead of remanding for trial, the Court of Appeal decided *four fact issues* without *any* evidentiary

record — a result which will certainly confound experts on *both* sides who thought that the next step in this case would be a trial to determine the facts.[6] With no trial court evaluation of evidence, the Court of Appeal purported to find as fact that:

- the ordinance *substantially advances* a legitimate governmental purpose;
- the ordinance *does not take the use* of First Church's property;
- the moratorium was enacted for a *reasonable* purpose; and
- the 2 1/2 year moratorium was in effect for a *reasonable* period of time.

None of those issues is capable of determination without evidence. *All* of them require fact examination.[7] One can-

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[6] *E.g.*, Bauman, 10 Zoning & Planning Law Report at 149, 150; Bozung & Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners* (1988) 20 The Urban Lawyer 969, 1015; Curtin & Durkee, *Money for the Taking: When Land Use Regulation Goes Too Far* (1988) 1 Hofstra Real Prop. L.J. 109, 122; Doheny & Edmondson, *Supreme Court Land Use Rulings: Responsible Controls Are Not Endangered* (1988) 1 Hofstra Real Prop. L.J. 95, 96; Freilich, Francis & Popejoy, 19 The Urban Lawyer at 801; Ginsburg, *Introduction* to *A Practitioner's Symposium on the Recent Supreme Court Takings Cases* (1988) 1 Hofstra Prop. L.J. 69, 70; Marsh & Rosenthal, *At Long Last, The Supreme Court Speaks Out on the "Taking" Issue* (No. 2 1987) 5 Cal. Real Prop. L.J. 1, 2; Merriam, *Commentary on First English and Nollan* (1988) 1 Hofstra Real Prop. L.J. 83, 84, 85; Peterson, 39 Hast. L.J. at 337; Schnidman, *The United States Supreme Court Finally Addresses the Regulatory Taking Issue* (1987) 14 Fla. Env. & Urban Issues, no 4 at 2, 3; Comment (1988) 28 Nat. Res. J. 585, 603; Note (1988) 48 La. L. Rev. 947.

[7] The Court of Appeal's opinion abounds with other fact issues on which the Court of Appeal assumed the outcome: the presence of "substantial" structures on the property poses a threat to public

(continued)

not determine whether the prohibition of this ordinance is necessary to substantially advance a legitimate County interest without evidence of the need or available alternatives if there is a need. Nor can the extent of denial of use be determined without evidence of the remaining uses and their value. Likewise, determining the reasonableness of both the purpose and length of a moratorium requires weighing evidence as to why 2 1/2 years are needed to decide what problem is presented and what methods of cure are available.

Appellate courts lack the experience, jurisdiction, and facilities to find facts. Without a record, no one can properly do so.[8]

(ftn. continued)
health and safety (App A, p 12); the public safety concerns at bench are "far more dominant" than those in *Keystone* (App A, p 14 fn 9); all use can be prevented *if* any use poses a threat to life and health (App A, p 17); use can be denied *if* property cannot be used without risking injury and death (App A, p 17); the subject property still has buildable areas (App A, p 21); the restriction in this case is "nowhere near as Draconian" as the destruction of trees in *Miller v. Schoene* (1928) 276 US 672 (App A, p 23); remaining "uses" are listed, without any evaluation of the economic viability of those uses (App A, p 23); First Church will benefit because neighbors will be prevented from building on the neighbors' land (App A, pp 24-25).

[8] Thus, for example, when the Court of Appeal concluded, that "... here, the public safety concerns are *far more dominant* than they are even in *Keystone Bituminous Coal*" (App A, p 14, fn 9; emphasis added), there was no basis for saying that. In *Keystone*, the statute was designed to prevent substantial damage to many homes, public buildings, public water supplies, public roads, pipelines, sewage lines, gas lines and water lines, all of which could be devastated by excessive underground coal extraction. (480 US at 475, 485-486) The Court of Appeal had no evidence at bench from which to make its contrast.

Nor is there evidence from which the Court of Appeal could properly conclude that the radical use prohibition at bench is "... nowhere near as Draconian ..." as the requirement that ornamental trees be cut down in *Miller* because of disease threatening others. (App A, p 23)

When the Court of Appeal says "[w]e cannot say that without a thorough-going study it would have been reasonably feasible to identify *any* structure which could be safely permitted . . ." (App A, p 27), the *reason* why the Court of Appeal "cannot say" is that there is no evidence.

Indeed, a commentary which did the same thing as the Court of Appeal (*i.e.*, it compared the allegations in the complaint to this Court's takings standards) reached the opposite conclusion from the Court of Appeal. That analysis demonstrated that a taking which required compensation was present at bench. (Comment, 28 Nat. Res. J. 395, 410-414) While this does not prove First Church's case, it casts doubt on the Court of Appeal's absolutist conclusions by showing that an opposite conclusion is equally plausible. That shows the need for trial.

Moreover, the Court of Appeal — over First Church's repeated objections — granted the County's request to take judicial notice of one-sidedly selected snippets of the County's files in order to permit the County to "prove" the need for this ordinance and the asserted lack of harm to First Church from its enactment.

Such appellate judicial notice *of facts which were NOT judicially noticed by the trial court* has been repeatedly condemned by this Court as a violation of due process of law. (*E.g.*, *Ohio Bell Telephone Co. v. Pub. Util. Commn.* [1937] 301 US 292; *Garner v. Louisiana* [1961] 368 US 157.)

In *Garner*, this Court condemned the very practice used by the Court of Appeal in this case, *i.e.*, permitting one party to "prove" its case by judicial notice in the reviewing court without allowing a trial court the opportunity to review the evidence or even to consider the "evidence" proferred for judicial notice:

> "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.' [Citation.]" (368 US at 173)

In *Ohio Bell*, this Court described the proper function of judicial notice:

> ". . . notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." (301 US at 301)

To go further, and use the judicially noticed material to *prove* the facts, as was done in the case at bench, is a denial of due process. (*Ohio Bell*, 301 US at 300, 302) The type of judicial notice employed at bench permits the decision maker to "wander afield" and make decisions "without reference to any evidence, upon proofs drawn from the clouds." (*Ohio Bell*, 301 US at 307)

The Court of Claims put it aptly:

> "Assuming *arguendo* that it would be proper to take judicial notice of these documents, the Government's *effort to inject them at this [appellate] stage comes too late.* Judicial notice is merely a way of introducing evidence without resort to the ordinary formalities; it does not circumvent the requirements of orderly judicial procedure [citations], and one of those requirements is that appellate tribunals should ordinarily consider only what has been properly presented to the trier of fact below. [Citations.]" (*Turtle Mountain Band of Chippewa Indians v. U.S.* [Ct Cl 1974] 490 F 2d 935, 945; emphasis added.)

The tactic employed by the California Court of Appeal denied First Church its due process right to trial of the facts.

2. THE COURT OF APPEAL IGNORED THIS COURT'S INSTRUCTION IN THIS CASE THAT THE FIFTH AMENDMENT "... IS DESIGNED NOT TO LIMIT THE GOVERNMENTAL INTERFERENCE WITH PROPERTY RIGHTS PER SE, BUT RATHER TO SECURE COMPENSATION IN THE EVENT OF OTHERWISE PROPER INTERFERENCE AMOUNTING TO A TAKING."

A
This Court's Guidance for Remand

Perhaps because, as the Court of Appeal acknowledged, "... the law is not well-settled in this area ..." (App A, p 10), this Court sought to provide guidance for its remand by reviewing and summarizing some bedrock precepts:

> "Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places *a condition on the exercise of that power*. [Citations.] This basic understanding of the Amendment makes clear that it is designed *not to limit* the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference* amounting to a taking. Thus, government action that works a taking of property rights *necessarily* implicates the 'constitutional

> obligation to pay just compensation.' [Citation.]" (482 US at 314-315; emphasis added; Court's emphasis deleted.)

But the Court of Appeal acted as though it did not understand.

The theme which permeates the Court of Appeal's opinion is that the County's flood protection program was necessary, and therefore, the program *could not* result in a taking of First Church's property.

That idea cannot be reconciled with this Court's conclusion that the purpose of the Just Compensation Clause of the Fifth Amendment is to require government to compensate for property taken in the course of "otherwise *proper*" interference.

This Court's holding in this case is a continuation of this Court's consistent holdings that a taking occurs *either* if the regulation is invalid *or*, if valid, the regulation denies the property owner economically viable use of his land.[9] As the Court has repeatedly held, the fact that an ordinance properly advances legitimate governmental interests cannot repeal operation of the Just Compensation Clause of the Fifth Amendment. (*E.g.*, *Loretto*, 458 US at 425; *Kaiser Aetna*, 444 US at 174; *U.S. v. Security Indus. Bank* [1982] 459 US 70, 74-75)

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[9] *Kirby Forest Indus., Inc. v. U.S.* (1984) 467 US 1, 14; *Agins v. City of Tiburon* (1980) 447 US 255, 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 124; *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174 fn 8; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US 340, 349 ["reasonable beneficial use"]; *Nollan v. California Coastal Commn.* (1987) 483 US 825, 834; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US 470, 485; *U.S. v. Riverside Bayview Homes* (1985) 474 US 121; *Williamson County Regional Planning Commn. v. Hamilton Bank* (1985) 473 US 172; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 US 264; *Schad v. Borough of Mount Ephraim* (1981) 452 US 61.

The Court of Appeal's belief in the virtue of the County's action not only fails to satisfy the terms of the remand from this Court, it is irrelevant. As a perceptive commentary noted:

> "[R]evitalization of constitutional guarantees is the most fundamental meaning of the case. *First English* stands as a reminder that even ends which benefit society do not justify means forbidden by the Constitution as unfair to individuals. Its reaffirmation of the mutually dependent relationship between liberty and property which lies at the heart of the just compensation clause of the fifth amendment may in the end prove to be its most significant message." (Comment, *He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property After First English Evangelical Lutheran Church v. County of Los Angeles* [1988] 53 Mo. L. Rev. 70, 120)

The Church whose case inspired that "revitalization" is entitled to its protection.

B

"Flood Protection" Does Not Justify an Uncompensated Regulatory Taking

When inquiring whether a governmental regulation invokes the Just Compensation Clause of the Fifth Amendment, the question is not the subject matter of the governmental regulation but the impact on the private property owner. (*See, e.g., Kaiser Aetna*, 444 US at 174; cases collected in *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621, 651-53 [Brennan, J, dissenting].)

A recent case from Rhode Island is instructive. In *Annicelli v. Town of South Kingstown* (RI 1983) 463 A 2d 133, the Town had zoned the property owners' land as being in a "High Flood Danger District." Nothing in the opinion of

the Rhode Island Supreme Court disagreed with the Town's factual conclusions of flood danger. Nonetheless, placing the subject property in a high flood danger zoning district — which precluded development — required compensation.

As *Annicelli* thus makes clear, there is nothing about flood control which automatically immunizes flood control ordinances from Constitutional examination. The late Professor Arvo Van Alstyne, a nationally recognized authority on land use and inverse condemnation law, aptly expressed the point:

> "[L]and use regulations may be constitutionally suspect if so narrowly conceived, with respect to permissible uses, as to render the subject property virtually valueless for normal private purposes while permitting a few uses that appear to be calculated to promote broad community benefits of a kind which could also be readily achieved through an exercise of the power of eminent domain. For example, *flood plain developmental restrictions, enacted to facilitate a community flood control and storm drainage program*, have sometimes been held invalid in the absence of carefully drafted provisions designed to permit maximum private utilization of the subject property for purposes not inconsistent with flood control objectives." (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* [1970] 44 So. Cal. L. Rev. 1, 24-25; emphasis added.)[10]

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[10] Illustrative flood control cases are *Dooley v. Town of Fairfield* (Conn 1964) 197 A 2d 770; *Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills* (NJ 1963) 193 A 2d 232; *Hager v. Louisville & Jefferson County* (Ky 1953) 261 SW 2d 619; *MacGibbon v. Board of Appeals* (Mass 1964) 200 NE 2d 254; *State v. Johnson* (Me 1970) 265 A 2d 711; *Mattoon v. City of Norman* (Okla 1980) 617 P 2d 1347; *Annicelli*.

(continued)

Flood control ordinances are judged by the same Constitutional standards as other land use regulations.

3. THE COURT OF APPEAL IGNORED THIS COURT'S STANDARDS FOR DETERMINING WHEN A REGULATION VIOLATES THE FIFTH AMENDMENT: *I.E.*, IF IT DEPRIVES THE PROPERTY OWNER OF "ECONOMICALLY VIABLE USE" OR INTERFERES WITH THE PROPERTY OWNER'S "REASONABLE, INVESTMENT-BACKED EXPECTATIONS" FOR USE OF THE PROPERTY

The law of just compensation is so lacking in bright dividing lines (see App A, p 10) that the Justices of this Court have frequently commented that whether the facts of any particular case give rise to a taking must be decided on an ". . . ad hoc factual . . ." basis in each case.[11]

(ftn. continued)
None of these cases are cited by the Court of Appeal, although they were called to that Court's attention in the briefs. Instead, the Court of Appeal makes a generalized citation to Professor Van Alstyne's article (App A, p 23), obviously failing to grasp the professor's conclusion quoted above.

11 *E.g.*, *Ruckelshaus*, 467 US at 1005; *Kaiser Aetna*, 444 US at 175; *Penn Central*, 438 US at 124. The "ad hoc factual" nature of the inquiry by itself militates against deciding the taking issue (as the Court of Appeal did) without any evidentiary inquiry. As expressed in *Hall v. City of Santa Barbara* (9th Cir 1986) 813 F 2d 198, 201-202:

> "This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability 'to develop any "set formula" ' for determining when compensation should be paid . . . While dismissal of a complaint for inverse condemnation is not always inappropriate, such a *dismissal must be reviewed with*

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The Court has, however, announced some guidelines. As summarized earlier, the Court has repeatedly held that a taking occurs if the government regulation denies the property owner "economically viable use" of his property (cases cited at p 13, fn 9) or if the regulation substantially interferes with the property owner's "reasonable, investment-backed expectations" for the use of the property.[12]

Although the Court of Appeal mentions the first of these standards (App A, pp 13-14), there is no way — without evidence — that *any* court can determine whether the County's regulation permitted "economically viable" use or not. To say, as the Court of Appeal does, that First Church can light campfires and pitch tents (App A, p 18) does not even approach an analysis of whether that is an "economically viable" use of 21 acres of land.[13]

(ftn. continued)

particular skepticism to assure that the plaintiffs are not denied a *full and fair opportunity* to present their claims." (Emphasis added.)

12 *Penn Central*, 438 US 104; *Andrus v. Allard* (1979) 444 US 51; *Kaiser Aetna*, 444 US 164; *PruneYard Shopping Center v. Robins* (1980) 447 US 74; *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 US 264; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419; *Kirby Forest*, 467 US 1; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986; *U.S. v. Locke* (1985) 471 US 84; *Williamson County*, 473 US 172; *Riverside Bayview*, 474 US 121; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 US 211; *MacDonald*, 477 US 340; *Keystone*, 480 US 470, 493 *et seq.*; *Hodel v. Irving* (1987) 481 US 704, 715; *Nollan*, 483 US at 833, fn 2.

13 *Compare Keystone*, for example, a case heavily relied on by the Court of Appeal (App A, pp 14, 17, 24), in which *evidence* had been introduced from which the Court concluded that the need for the statutory property restriction was great and the impact on the property owner was minimal. While the property owners lost in *Keystone*, they lost because the *evidence* failed to show a Constitutional violation, *not* — as here — because the reviewing court decided *without evidence* that no such cause of action could even be pled.

Nor is there any attempt in the Court of Appeal's opinion to apply the "reasonable, investment-backed expectations" standard, although that standard was called to the Court of Appeal's attention by First Church, was applied by this Court to a facial attack in *Keystone* (480 US at 493 *et seq.*), and is discussed in many of the law review articles cited in the Court of Appeal's opinion (see App A, p 7, fn 7).

The Court of Appeal's defiant opinion ignores this Court's repeatedly expressed standards for determining whether a regulation takes private property.

4. THE COURT OF APPEAL MISCONSTRUED THIS COURT'S CASES BY CONCLUDING THAT ALL REASONABLE USE OF A PARCEL OF PROPERTY CAN CONSTITUTIONALLY BE PROHIBITED WITHOUT COMPENSATION

The Court of Appeal said it perceived a "public safety exception" in this Court's jurisprudence which would permit the County to preclude all reasonable use of First Church's property without compensation. (App A, p 8 *et seq.*)

Wrong.

The extent of the use prohibition approved by the Court of Appeal in this case goes beyond anything this Court has ever countenanced. To be sure, the law has always been that *an activity* which is a nuisance to neighbors has no right to exist. But concluding that *a particular activity* may be a nuisance, and that *that activity* may be prohibited, is far from saying that *all reasonable use* of an *entire property* may be sacrificed for the public good without compensating the owner. And no decision of this Court has ever gone that far.

The Court of Appeal's jumping off point for this holding was the following sentence in this Court's opinion in this case:

> "We accordingly have *no occasion to decide . . . whether* the county *might* avoid the conclusion that a compensable taking had occurred *by establishing* that the denial of all use was insulated as a part of the State's authority to enact safety regulations. [Citations.]" (482 US at 313, emphasis added.)

If this Court intended that statement to be read as broadly as the Court of Appeal interpreted it, then this Court could have directly established that immunity as a matter of law. This Court did not. This Court remanded for trial to determine whether the County could *prove* that the draconian restriction imposed on First Church and the need which supposedly supported the County's ordinance were sufficient to require *consideration* of such a rule. The passage in this Court's opinion begins, "[w]e accordingly have no occasion to decide . . ." For the Court of Appeal to draw an ironclad rule from this Court's refusal to consider an issue is a leap due process of law does not countenance.

Moreover, this Court's comment cannot be read in a vacuum. It is necessarily tied to the cases cited as authority for the proposition, which were obviously intended to illustrate the lack of breadth of the statement. Those cases plainly demonstrate the Court of Appeal's error in its *carte blanche* blessing of the County's action.

In *Mugler v. Kansas* (1887) 123 US 623, operation of a brewery was precluded. In *Hadachek v. Sebastian* (1915) 239 US 394, operation of a brick manufacturing facility in a residential area was precluded. In *Goldblatt v. Hempstead* (1962) 369 US 590, operation of a rock quarry was precluded. A clear picture emerges: in each case, it was a *specific use* which the Court held could be prevented because *that specific use* constituted a nuisance which was troublesome to others. In *none* of this Court's cases has the Court held that *all* reasonable use could be prevented without compensation.

A

The Court of Appeal's Error is Shown by it's Need to *Distinguish* an Opinion on Which This Court Expressly Relied in This Case

The Court of Appeal's opinion disregards this Court's analysis by distinguishing (rather than applying) one of the cases on which this Court based its 1987 decision.

The Court of Appeal relied heavily on the holding in *Mugler*. (App A, pp 10-13) In so doing, the Court of Appeal emphasized the fact that "[t]he *Mugler* court *distinguished Pumpelly v. Green Bay Company* 13 Wall. 166." (App A, p 11; emphasis added.)

The error in that analysis (and the consequent error in heavily relying on *Mugler* while disregarding *Pumpelly*) is that, in *this* case, this Court relied on the analysis in *Pumpelly*, employing that analysis in the way the Court of Appeal rejected. As this Court put it in *this* case:

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon* . . . that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' [Citation.] While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. *In Pumpelly v. Green Bay Co.* [citation], construing a provision of the Wisconsin Constitution identical to the Just Compensation Clause, this Court said:
>
> > " 'It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the

> absolute conversion of real property to the uses of the public it can destroy its value entirely, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.'
>
> "Later cases have unhesitatingly applied this principle. [Citations.]" (482 US at 316-317; initial emphasis added; final emphasis, the Court's.)

The Court of Appeal's analytical error is confirmed by its conclusion that "[e]recting a dam which permanently submerges a property owner's land under a lake [*i.e.*, the facts in *Pumpelly*] is one thing, a law limiting his use of that land quite another." (App A, p 12)

That Court of Appeal conclusion is utterly at odds with what this Court said in this case when it *applied Pumpelly*. Moreover, this Court's opinion in this case represents an adoption by the Court of the dissenting views of Justice Brennan in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621.[14] As expressed there (450 US at 652):

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. ***From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.***" (Brennan, J, dissenting on behalf of 4 Justices;

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[14] That *First English* derives from Justice Brennan's *San Diego Gas* dissent is evident from *First English's* repeated citation of that dissent as authoritative. (482 US at 315, 316 fn 9, 318)

> additionally, Rehnquist, J, [the eventual author of *First English*] while concurring with the majority's procedural ruling, agreed with Justice Brennan's substantive analysis [450 US at 633]; emphasis added.)

The Court of Appeal's analysis is founded on a premise rejected by this Court. In refusing to apply *Pumpelly*, and — instead — applying its antithesis, the Court of Appeal feebly tried to rationalize its evasion of this Court's remand.

B

First Church Experiences No "Reciprocity of Advantage" in Being Prevented From Making Reasonable Use of its Property

This Court's explicit rationale for permitting the use of the police-power to preclude *noxious* uses is that *all* property owners — including the regulated owner — benefit from the restrictions placed upon each for the good of the community:

> "The Court's hesitance to find a taking when the state *merely restrains uses* of property that are tantamount to public nuisances is consistent with the notion of '*reciprocity of advantage*' that Justice Holmes referred to in Pennsylvania Coal. Under our system of government, one of the state's primary ways of preserving the public weal is *restricting the uses* individuals can make of their property. While each of us is *burdened somewhat* by such restrictions, we, in turn, *benefit greatly* from the restrictions that are placed on others."[15]

That analysis by this Court demonstrates that a regulation cannot Constitionally prevent all, or substantially all, use of

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[15] *Keystone*, 480 US at 491. (Emphasis added.) Please note that the Court is talking in terms of *restricting* uses, not *preventing all* economically viable use.

property. The owner of property who is prevented from making *any* reasonable use of his land cannot obtain any "reciprocity of advantage," or "benefit greatly" — or benefit at all — by "mutual" restrictions placed on others, as a totally restricted owner is precluded by nonuse from receiving any benefit. This "reciprocity of advantage" theory — which is the central justification for substantial use preclusion — can operate *only* in the context of all owners being permitted to make some reasonable, economically viable, use of their land.

The Court of Appeal recognized the necessity for there to be a "reciprocity of advantage" to justify restricting the use of First Church's property. But — again without any evidence to support it — the Court of Appeal *assumed* that First Church *received* some reciprocal "advantage" based on the Court of Appeal's further assumption that building campfires and pitching tents gave First Church reasonable use of its property. (App A, pp 24-25)

The concept of "reciprocity of advantage" can be difficult to understand and apply in routine zoning situations. However, to the extent that it has any force, its application is limited to those situations in which *all* property owners are permitted to make economically viable use of their land, even though it may not be the most profitable use. (*See, e.g., Penn Central*, in which the owner of New York's Grand Central Station was precluded from building a large office building over the terminal but was allowed to make a profitable use. Penn Central benefitted because the property's neighbors could not overbuild surrounding parcels. Likewise, in *Agins* [relied on at App A, p 15], the property was zoned to *permit* from 1 to 5 homes, which is all the property owners wanted. Similar restrictions on their neighbors would provide some "reciprocal" benefit by preserving the luxury character of the neighborhood.)

Nothing in either this Court's holdings or their rationale supports the notion that an individual may be singled out to

be forced to "donate" — without compensation — all reasonable use of his property for the greater good of the community.

5. THE COURT OF APPEAL IGNORED THIS COURT'S HOLDING THAT PROPERTY OWNERS HAVE A *RIGHT* TO BUILD ON THEIR PROPERTY, SUBJECT ONLY TO REASONABLE REGULATION OF THEIR CONDUCT

A fundamental basis for the Court of Appeal's decision is the factual assertion that the ordinance did not prevent *use*, it "only" prevented *construction of buildings*. (App A, p 18)

How substantial is an impact of the preclusion of buildings on a conference and recreational site which takes hours to reach from the homes of First Church's members is a fact question for trial.

Equally important, the Court of Appeal's conclusion (*i.e.*, that the prevention of construction of buildings *cannot* be a taking *as a matter of law*) is erroneous.

This Court addressed this issue in *Nollan*. Whether local government may prevent building without compensation (on the theory that construction is a "privilege" or "benefit" bestowed by government [as California courts ruled before *Nollan*], rather than a right of the property owner) was dealt with directly:

> "But *the right to build on one's own property* . . . even though its exercise can be subjected to legitimate permitting requirements . . . cannot remotely be described as a 'governmental benefit.' " (483 US at 834, fn 2; emphasis added.)

The right to build is just that — a *right*. To take that right — as this ordinance does (App A, p 18) — requires compensation.

Although the Court of Appeal disagrees, this Court has plainly announced that the rules have changed. Citizens have a right to build on their land, subject only to reasonable regulation, not prohibition.

6. THE COURT OF APPEAL VIOLATED THIS COURT'S REQUIREMENT THAT GOVERNMENT REGULATIONS WHICH ABRIDGE THE RIGHTS OF PRIVATE PROPERTY OWNERS BE SUBJECTED TO HEIGHTENED SCRUTINY

The Court of Appeal examined the County's rationalizations for its regulation by a relaxed standard of review which this Court disapproved two years ago:

In *Nollan*, the Court announced the proper standard:

> "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and imagination*. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate State interest. We are inclined to be *particularly careful* about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective*." (483 US at 841; some emphasis added.)[16]

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16 As this Court elaborated:

> ". . . our opinions do *not* establish that these standards are *the same* as those applied to due process or equal protection claims. To the contrary, our verbal formula-

(continued)

Being "particularly careful" in examining the basis of a regulation, as *Nollan* requires, mandates that the courts give substantially less deference to the rationalizations put forth by the government than in pre-*Nollan* times. Regulations can no longer be judicially sustained merely because there is *some* rational basis for believing that the challenged action *might* be necessary. (483 US at 834-835, fn 3) Nor are they to be routinely approved because of some generalized presumption of validity. (See App A, p 25)

Professor Daniel Mandelker, who describes himself as a "police power hawk," and who favors the power of government to regulate, explained the matter clearly in the recent rewriting of his nationally recognized text:

> "*Nollan's most important holding is the heightened standard of judicial review* it adopted for determining whether a land use regulation substantially advances legitimate governmental interests. This heightened judicial review standard, if the Court meant it to apply to all taking cases, substantially strengthens judicial review of land use regulations under the taking clause." (Mandelker, *Land Use Law* [2d ed 1988] §2.23 at 45; emphasis added.)[17]

(ftn. continued)
tions in the takings field have generally been *quite different*. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [citation], *not* that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' [Citation.]" (483 US at 834, fn 3; emphasis added; Court's emphasis deleted.)

[17] The same analysis of *Nollan* appears in Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules For Exactions* (1987) 10 Zon. & Plan. L. Rep. 153, 156; Bosselman & Stroud (1987) *The Current Status of Development Exactions*, 14 Fla. Env't & Urb. Issues 8, 9; Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission* (1988) 12 Harv. Env. L. Rev. 231; Marsh & Rosenthal, 5 Cal.
(continued)

This Court's analysis in *Nollan* shows the accuracy of this conclusion. There, the government sought to rely on the minimal, rational basis standard of review used here by the Court of Appeal. But this Court disagreed. Instead, this Court subjected the government's rationales to strict scrutiny, concluding that one justification for the action was ". . . a made-up purpose of the regulation . . ." (483 US at 839, fn 6), while others were ". . . impossible to understand . . ." (483 US at 838)

This Court's *Nollan* analysis was recently applied by the New York Court of Appeals in *Seawall Associates v. City of New York* (1989) 74 NY 2d 92. There, the court was confronted with analyzing the Constitutionality of a city ordinance requiring the owners of low rent apartment/hotels to maintain their properties and rent all units. The ostensible purpose was to alleviate the severe problems of the homeless.

Applying the heightened scrutiny required by this Court in *Nollan*, the New York court found that the city's explanation for its ordinance, while superficially plausible, failed the *Nollan* test. Upon analysis, it was clear that compelling the owners of the regulated properties to perform this public service did not *substantially* advance a legitimate public purpose and *in fact* would have little impact on the homeless problem. The ordinance was struck down because of its failure to establish the nexus required by *Nollan* between the end sought to be accomplished and the means chosen by the city to do so.

(ftn. continued)
Real Prop. J. 1; Peterson, 39 Hast. L.J. at 338; Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective* (1988) 20 The Urban Lawyer 515, 579-580; *Supreme Court, 1986 Term: Leading Cases* (1987) 101 Harv. L. Rev. 119, 247; Comment (1987) 21 Creighton L. Rev. 213, 232; Comment (1987) 17 Golden Gate U.L. Rev. 197, 255; Comment, 54 Brooklyn L. Rev. 991; Comment (1988) 39 Mercer L. Rev. 1033, 1053.

Here, the Court of Appeal violated *Nollan*'s standard of review and presents a striking conflict with the analysis of the New York Court of Appeals in *Seawall*.[18]

CONCLUSION

The California Court of Appeal has thumbed its nose at this Court's remand. It has misconstrued the remanding opinion and it has ignored and misapplied other controlling precedents of this Court. In the process, it has continued California's position as a judicial system which fails to provide property owners with the protection guaranteed by the Fifth Amendment, creating conflict, *inter alia*:

- with the Rhode Island Supreme Court on the question of compensation for flood control ordinances which preclude the use of private property, and
- with the New York Court of Appeals on the question of how to apply *Nollan*'s heightened scrutiny of ordinances which take the use of private property.

Fundamentally, even ignoring other legal errors committed by the Court of Appeal, the Court of Appeal purported to decide fact issues with *no* evidence, *no* trial, and *no* factual record, thus denying First Church due process of law.

This Court's guidance is sorely needed. As this Court is aware, cases involving regulatory takings of property continue to be litigated. The standards to be applied by lower state and federal courts require further definition for the

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[18] This assumes that review of the basis of the County's ordinance was even before the Court of Appeal. It was not. The only issue raised in the Superior Court by the County was the "irrelevance" of an inverse condemnation cause of action because of *Agins's* conclusion that there could be no compensatory remedy. (Clerk's Transcript 27, 45) No justification of the ordinance was ever proffered in the Superior Court proceedings.

benefit of all parties to the land use planning process and the judges who must evaluate its impacts. As the Supreme Court of Washington put it recently, after a tortured attempt to determine the appropriate standards from this Court's jurisprudence:

> "Despite these attempts [*i.e., First English, Nollan,* and *Keystone*], the definitive answers so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [federal regulatory] takings jurisprudence.' " (*Orion Corp. v. State* [1987] 109 Wash 2d 621, 653)[19]

Three of the California Supreme Court's Justices saw the problem, but that Court's need (mandated by the California Constitution) to review hundreds of death penalty cases *de novo* has effectively stalled the California Supreme Court's civil case review. (*See* Uelmen, *The Court Sits Down to a Full Plate*, ABA Journal [California Edition] CE-1 [Oct 1988].)

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[19] For other similar struggles, *see, e.g., Parranto Brothers, Inc. v. City of New Brighton* (Minn App 1988) 425 NW 2d 585; *Maryland Port Administration v. QC Corp.* (Md 1987) 529 A 2d 829; *Loveladies Harbor, Inc. v. U.S.* (Cl Ct 1988) 15 Cl Ct 381.

Bench, bar, and private citizens need this Court's guidance. First Church prays that Certiorari be granted.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
RICHARD D. NORTON
of FADEM, BERGER & NORTON

By: MICHAEL M. BERGER
Counsel of Record

Attorneys for Petitioner
First English Evangelical Lutheran
Church of Glendale

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL
SECOND DIST.
FILED
MAY 26, 1989
Robert N. Wilson, Clerk

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
CALIFORNIA, and LOS ANGELES
COUNTY FLOOD CONTROL DISTRICT,
Defendants and Respondents.

NO. B003702
(Super.Ct. No. C 273634)

APPEAL from a judgment of the Superior Court of Los Angeles County. Albert D. Matthews, Judge. Affirmed and remanded.

Fadem, Berger & Norton, and Michael M. Berger, for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel of Los Angeles County, and Arnold K. Graham, Principal Deputy County Counsel, for Defendants and Respondents.

In this opinion we consider an issue on remand from the United States Supreme Court. The high court held a landowner is entitled to compensation — not merely injunctive relief — when a court finds there has been no unconstitutional regulatory taking. But the Supreme Court expressly reserved the question whether respondent's regulatory action in this case amounted to an unconstitutional taking. We decide appellant failed to state a cause of action for two independent and sufficient reasons: (1) The interim ordinance in question substantially advanced the preeminent state interest in public safety and did not deny appellant all use of its property. (2) The interim ordinance only imposed a reasonable moratorium for a reasonable period of time while the respondent conducted a study and determined what uses, if any, were compatible with public safety.

FACTS AND PROCEEDINGS BELOW

This is an action for property damage caused by the flooding of plaintiff's 21-acre private campground, Lutherglen, located at the bottom of a canyon in the Angeles National Forest, at 23200 Angeles Forest Highway, Palmdale, California.

Plaintiff, First English Lutheran Evangelical Church of Glendale (First English) purchased Lutherglen in 1957. Twelve acres are flat land, elevated a little above the banks of Mill Creek, a natural watercourse running down the canyon through Lutherglen, and emptying approximately ten miles below into the Big Tujunga Dam. On this part of the property, First English built a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across Mill Creek.

The Middle Fork of Mill Creek is the natural drainage channel for the watershed area (watershed area) owned by the National Forest Service (Forest Service) upstream of Lutherglen. The Middle Fork joins Mill Creek about 1-1/2

miles above Lutherglen, just below the point where the Angeles Forest Highway (highway) crosses the Middle Fork at Mileage Marker 16.56 (M.M. 16.56). The highway, built by defendant County of Los Angeles (County) with Forest Service approval, crosses the Middle Fork at about 20 locations in the canyon. At M.M. 16.56, the Middle Fork flows beneath the highway through two metal culverts placed by the County in the highway's solid raised dirt embankment.

About 3,860 acres of the watershed area were burned in a fire known as the Middle Fire in July 1977. It is undisputed that the Middle Fire created a potential flood hazard.[1]

On February 9 and 10, 1978, a disaster waiting to happen finally arrived. A storm dropped a total of 11 inches of water in the watershed area. A giant wall of water rushed toward the fragile structures people had erected on the banks of the creek. The docile, often dry creek became a raging river and overflowed the banks of the Middle Fork and Mill Creek. The highway's culverts at M.M. 16.56 were inadequate to handle the volume of water.[2] The flood drowned

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[1] The vegetation of a watershed area normally protects against flooding because the vegetation slows the flow of water, which can then percolate into the soil or be carried away by streams. When the vegetation is burned, however, there is no slowing of the flow, and the crust on the ground formed by the fire's intense heat prevents percolation of water into the soil. Additionally, the ash and debris from the fire increase the bulk of the flow, known as the bulking factor, which increases the erosion damage caused by the runoff.

[2] Mill Creek at Lutherglen had a capacity of about 6,000 cubic feet of water per second (cfs). During the storm, the peak runoff just below Lutherglen was 8,800 cfs, 6,100 cfs of which came from Middle Fork and 2,700 cfs of which came from Mill Creek. Normally, had the watershed area not been burned, the flow from Mill Creek would have exceeded the flow from Middle Fork. Approximately 380,000 cubic yards of debris and sediment were carried by the runoff from the watershed area. About 12,000 cubic yards were deposited behind the highway at M.M. 16.56, about 38,000

(continued)

ten people in its path, swept away bridges and buildings, and inflicted millions of dollars in losses. Fortuitously, Lutherglen's planned camp for handicapped children scheduled for that week had been postponed. So no lives were lost on its property when the surging waters engulfed Lutherglen and destroyed its buildings.

Plaintiff filed this inverse condemnation action against the County and the Los Angeles County Flood Control District (District), claiming that the damage to Lutherglen constituted a taking without payment of compensation contrary to article I, section 19 of the California Constitution.[3] The first cause of action alleges that (1) the defendants are liable under Government Code section 835[4] for controlling the Middle Fork and the highway at M.M. 16.56, which constituted a dangerous condition of public property; and (2) that a County ordinance adopted after the flood constituted an unconstitutional taking of property by prohibiting all use of Lutherglen's 21 acres. The second cause of action alleges that the District engaged in cloud seeding during the storm, for which it is liable in tort and inverse condemnation.

The trial court granted the following pretrial motions: (1) defendants' motion to strike the portion of the first cause of action for damages in inverse condemnation based on the taking of all use of Lutherglen by a County ordinance; (2) the District's motion for judgment on the pleadings on the second cause of action in tort and inverse condemnation based on cloud seeding; and (3) defendants' motion to limit

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(ftn. continued)
cubic yards were deposited in Lutherglen, and the rest was deposited at Hansen Dam.

[3] All references concerning the complaint refer to the Second Amended Complaint for Inverse Condemnation filed on January 5, 1981.

[4] Hereafter all section references are to the Government Code unless otherwise indicated.

the trial to the first cause of action for damages under section 835, rather than in inverse condemnation.

The trial, which proceeded solely on the section 835 action, was bifurcated and liability was tried to a jury prior to damages. At the close of plaintiff's evidence on liability, the court granted defendants' motion for nonsuit. A judgment of nonsuit dismissing the entire complaint was entered. In its initial appeal to this court, First English appealed the judgment of dismissal and also sought appellate review of the pretrial rulings enumerated above, and of the post-judgment order awarding costs and fees to defendants.

In an unpublished opinion authored by Justice Thompson, this court affirmed the nonsuit of the section 835 cause of action but reversed the dismissal of the claim of inverse condemnation based on the County's cloud seeding efforts. As to the "regulatory taking" cause of action based on the interim County ordinance prohibiting First English from rebuilding the destroyed buildings, Justice Thompson wrote: "We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*. (*Auto Equity Sales, Inc. v. Superior Court* (1982) 57 Cal.2d 450, 455.)" (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, et al.* (No. B003702), unpublished slip opinion, at p. 22.)[5]

The California Supreme Court adhering to its own precedent in *Agins v. Tiburon* denied review on the "regulatory taking" as well as all other issues raised in the initial appeal. But the United States Supreme Court seized upon the case to

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[5] In *Agins v. Tiburon* (1979) 24 Cal.3d 266, affd. on other grounds (1980) 447 U.S. 255, the California Supreme Court held a property owner was not entitled to monetary damages unless and until a court ruled a land use regulation was excessive and the government nevertheless chose to continue it in effect.

finally resolve the remedy issue, a question it had been unable to reach for procedural reasons in a series of prior appeals.[6] The Supreme Court limited its grant of certiorari to our ruling on the "regulatory taking" cause of action. In a 6-3 decision the high court reversed our resolution of this issue. The majority held we were in error because we relied on an erroneous ruling of the California Supreme Court in *Agins*. The Supreme Court held monetary damages indeed can be sought as an initial remedy for "inverse condemnation" claims based on unconstitutional "regulatory takings." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 321.) However, the Court limited its decision to this single issue and remanded the case to our court to determine whether the County's ordinance actually represents an unconstitutional "taking" of appellant's property without compensation. (*Id.* at pp. 313, 321, 322.)

DISCUSSION

Our own previous opinion and that of the Supreme Court define what it is we have yet to resolve in the instant opinion. The trial court made its order striking the inverse condemnation conversion allegation based on the California Supreme Court ruling that damages are not available for a "regulatory taking" until after the regulation in fact is ruled to be an unconstitutional taking and the government elects to continue the regulation in effect. This grounds for the order has been overturned. We must now decide whether this order

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[6] "Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule. See *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340; *Williamson County Regional Planning Comm. v. Hamilton Bank* (1985) 473 U.S. 172; *San Diego Gas & Electric Co [v. San Diego* (1981) 450 U.S. 621]; *Agins v. Tiburon, supra.*" (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 310 [96 L.Ed.2d 250, 107 S. Ct. 2378].)

can be sustained on any other grounds. For, it is well settled that a trial court's decision is not to be reversed merely because it was based on erroneous grounds if there is an alternative rationale which will support that judgment. (*Keenan v. Dean* (1955) 134 Cal.App.2d 189 [appellate court can uphold motion to strike granted on erroneous grounds if demurrer could have been sustained for failure to state cause of action].)

The United States Supreme Court in *First English* made it abundantly clear the Court was deciding the remedies issue — and only that issue.[7] The majority specifically held it

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[7] First English and another land use case decided the same term — *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 97 L.Ed.2d 677 — have engendered enormous interest in the academic community. (See, e.g., Horder, *Where Is The Supreme Court Heading in Its Taking Analysis and What Impact Will This Direction Have on Municipalities?* (1988) 28 Natural Resources J. 585. Geraci and Nabozny-Younger, *Damages for a Temporary Regulatory Taking: First English Evangelical Lutheran Church v. County of Los Angeles* (1988) 24 Cal. Western L.Rev. 33. Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Church and Nollan* (1988) 59 Univ. of Colo. L.Rev. 427. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning* (1988) 20 Urban Law 735. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule* (1987) 18 Environmental L. 3. Falik and Shimko, *The "Takings" Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California* (1988) 39 Hastings L.J. 359. Siemon and Larsen, *The Taking Issue Trilogy: The Beginning of the End?* (1988) 33 Wash. Univ. J. of Urban & Contemporary L. 169. Acton, *Much Ado about Nollan: The Supreme Court Addresses the Complex Network of Property Rights, Land Use Regulations, and Just Compensation in the Keystone, Nollan, and First English Cases* (1988) 17 Stetson L.Rev. 727. Woodard, *Constitutional Law: Is Time Running Out for the Government to Dispute Regulatory Takings?* (Spr. 1988) 10 Campbell L.Rev. 275. Patton, *Affirmative Relief for Temporary*

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was not deciding appellant had stated a cause of action. As Chief Justice Rehnquist wrote: "In affirming the decision to strike this allegation, the Court of Appeal [this court] assumed that the complaint sought 'damages for the uncompensated *taking* of all use of Lutherglen by County Ordinance No. 11,855.' . . . It relied on the California Supreme Court's *Agins* decision for the conclusion that 'the remedy for a *taking* [is limited] to nonmonetary relief . . . .' . . . . The disposition of the case on these grounds isolates the remedial question for our consideration. The rejection of appellant's allegations did not rest on the view that they were false . . . . Nor did the court rely on the theory that regulatory measures such as ordinance No 11,855 may never constitute a taking in the constitutional sense. Instead, the claims were deemed irrelevant solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a 'temporary' regulatory taking . . . .

"We reject appellee's suggestions that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question . . . . We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part

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(ftn. continued)
Regulatory Takings (Summ. 1987) 48 U. of Pittsburgh L.Rev. 1215. Johnson, *Compensation of Landowners for Temporary Regulatory Takings* (Summ. 1987) 21 Ga.L.Rev. 1169. Lodise, *Retroactive Compensation and the Illusion of Economic Efficiency: An Analysis of the First English Decision* (1988) 35 UCLA L.Rev. 1267. Falik & Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence* (Spr. 1988) 23 Real Property, Probate & Trust J. 1. Batchelder, *Flood Plain Zoning in California — Open Space by Another Name: Policy and Practicality* (Feb. 1973, Vol. 10, No. 2) San Diego L.Rev. 381.)

of the State's authority to enact safety regulations. (Citations omitted.) *These questions, of course, remain open for decision* on the remand we direct today." (Italics added.) (*First Lutheran Church v. Los Angeles County, supra*, U.S. 482, 311, 313.)

The very limited nature of the Court's holding was underscored in a portion of the dissenting opinion which was not controverted in any way in the majority opinion. As Justice Stephens wrote in his dissenting opinion for three members of the Court: "The Court of Appeal affirmed on the authority of *Agins* alone, . . . without holding that the complaint had alleged a violation of either the California Constitution or the Federal Constitution. At most, it assumed, *arguendo*, that a constitutional violation had been alleged.

"This Court clearly has the authority to decide this case by ruling that the complaint did not allege a taking under the Federal Constitution, and therefore to avoid the novel constitutional issue that it addresses. Even though I believe the Court's lack of self-restraint is imprudent, it is imperative to stress that the Court does not hold that appellant is entitled to compensation as a result of the flood protection regulation that the County enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.

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"[A]lthough the Court uses the allegations of this complaint as a springboard for its discussion of a discrete legal issue, it does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the county's effort to preserve life and property could ever constitute a taking. As far as the United States Constitution is concerned, the claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits."

(*First Lutheran Church v. Los Angeles County, supra*, U.S. 482, at pp. 324-325, 328, Stevens, J., dissent.)

This brings us to the question whether the substantive allegations of the "regulatory taking" claim state a valid cause of action. The answer to this question, in turn, depends upon whether the public is justified in placing the burden of these restrictions on this private landowner rather than compensating the landowner for the uses it is required to give up. Commentators have noted the law is not well-settled in this area. (See, e.g., Siemon and Larson, *The Taking Issue Trilogy: The Beginning of the End?, supra*, 33 Wash. Univ. J. of Urban & Contemporary L. 169.) Nevertheless, there are enough guideposts to resolve the instant case. It simply does not pose a close issue under any formulation the Supreme Court has suggested as the appropriate test for judging when compensation is required.

I. THE "PUBLIC SAFETY EXCEPTION" AND OTHER GOVERNMENTAL RESTRICTIONS ON THE USE OF PRIVATE PROPERTY

Earlier we quoted Chief Justice Rehnquist's majority opinion in *First English* where he raised the possibility "the denial of all use was insulated [from compensation] as a part of the State's authority to enact safety regulations." One of the cases the Chief Justice mentioned in support of that proposition was the seminal decision, *Mugler v. Kans*as (1887) 123 U.S. 623. In that case, an owner of a brewery challenged a newly enacted state liquor prohibition law on grounds it constituted a taking of his property rights without compensation because it denied him use of his property. The Supreme Court in an opinion by Justice Harlan held this was not a compensable taking but rather a proper exercise of the state government's "police powers." "Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known

as the police powers of the State, and to determine, primarily what measures are appropriate, are needful for the protection of the public morals, the public health or the public safety.

"Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals, or the public safety is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument or interfere with the execution of the powers confided to the government. (Citations omitted.) Upon this ground . . . defendants . . . [contend] that, as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishment will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; their prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law.

"This interpretation of the 14th Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community . . . [A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. (Citations omitted.)" (123 U.S. at pp. 660-665.)

The *Mugler* court distinguished *Pumpelly v. Green Bay Company* 13 Wall. 166. In that case the Supreme Court had held the state was required to compensate a property owner whose land was completely flooded when the government erected a dam across a river. "[*Pumpelly*] was a case in 'which there was a permanent flooding of private property,' a 'physical invasion of the real estate of the private owner and a practical ouster of his possession.' His property was, in effect, required to be devoted to the use of the public, and,

consequently, he was entitled to compensation." (123 U.S. at p. 668.)

Erecting a dam which permanently submerges a property owner's land under a lake is one thing, a law limiting his use of that land quite another. As the *Mugler* court ruled: "A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest. Nor can legislation of that character come within the 14th Amendment, . . . unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation to deprive the owner of his liberty and property, without due process of law. *The power which the states prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted . . . to inflict injury upon the community.*" (123 U.S. at pp. 668-669, italics added.)

We recognize a brewery is a far cry from a Bible camp. But here the threat to public health and safety emanates not from what is produced on the property but from the presence of any substantial structures on that property. The principles enunciated in *Mugler* have been applied by the Court to uphold prohibitions against a broad range of other uses of one's property — e.g., an ordinance prohibiting the manufacture of bricks inside the city limits of Los Angeles

(*Hadacheck v. Sebastian* (1915) 239 U.S. 394); a requirement property owners cut down red cedars which were infected with a communicable plant disease fatal to neighboring apple orchards. (*Miller v. Schoene* (1928) 276 U.S. 272); and a prohibition against excavating below the water table in order to extract gravel (*Goldblatt v. Town of Hemstead* (1962) 369 U.S. 590).

Sometimes government exercises its police powers through the enactment of zoning ordinances and other forms of land use regulation. Whether a specific regulation represents an unconstitutional "taking" involves the same considerations as suggested in *Mugler* and its progeny.

Recently, in *Agins v. Tiberon* (1980) 447 U.S. 255, Justice Powell writing for a unanimous court gathered the strands of earlier cases[8] and articulated the test which the high court now invokes in zoning cases. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests (citation omitted) or denies an owner economically

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[8] The first Supreme Court case to address the constitutionality of municipal zoning itself was *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 which upheld the validity of this form of land use regulation by analogy to the government's power to regulate public nuisances on private property. It is noteworthy this case was written in the heyday of "substantive due process" when the Supreme Court freely struck down many other regulatory laws. Indeed *Euclid v. Ambler* was authored by one of the chief exponents of "substantive due process", Justice Sutherland. The next few years saw a number of cases accepting the constitutionality of land use regulation (*Zahn v. Board of Public Works* (1927) 274 U.S. 325; *Gorieb v. Fox* (1927) 274 U.S. 603) although two opinions of that era disapproved specific provisions not remotely resembling the instant ordinance and its public safety concerns (*Nectow v. City of Cambridge* (1928) 277 U.S. 183; *Washington ex rel. Seattle Title Trust Co. v. Roberge* (1928) 278 U.S. 116).

viable use of his land (citation omitted).[9] The determination that governmental action constitutes a taking is, in

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[9] The essence of this test was set forth in 1922 when the court denied relief to a homeowner whose house was threatened with damage because of a coal mining operation beneath his property. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.) The majority opinion by Justice Holmes held a newly enacted "subsidence" law amounted to an unconstitutional taking of the mineowners' entire "surface support" property interest, an interest the landowners above had sold them previously. Although Justice Holmes did not use the precise words the court subsequently set forth as a test in *Agins*, a later opinion pointed out he was talking about the same factors — the public interest the regulation advances and the degree of the taking. (*Keystone Bituminous Coal Assn. v. De Benedictis* (1987) 480 U.S. 470, 485 [94 L.Ed.2d 472].) Notably, as the Supreme Court pointed out in that same opinion, Justice Holmes did not contest the main legal premise of Justice Brandeis' dissent — government has an absolute right to prohibit land uses which constitute a public nuisance. Instead Justice Holmes attacked the minor premise. (480 U.S. at p. 488, fn. 17, citing 260 U.S. at pp. 413-414, 417.) He found the particular statute involved was not a legitimate exercise of the police power but only a "private benefit" statute which shifted economic benefits from individual mineowners to individual building owners. "A source of damage to such a house is not a public nuisance .... Further, *[the statute] is not justified as a protection of personal safety.* That could be provided for by notice." (260 U.S. at pp. 413-414, italics added.) Justice Holmes then shifted to the other factor and found "the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land — a very valuable estate — and what is ... a contract ... binding on the [homeowner]." (*Ibid.*)

In *Keystone Bituminous Coal* the Supreme Court distinguished Justice Holmes majority opinion in *Pennsylvania Coal* and upheld a similar "subsidence" statute by emphasizing the Legislature enacted the new law to advance the "health, safety and general welfare" of the public instead of "merely ... balancing ... the private economic interests of coal companies against the private interests of the surface owners." (*Keystone Bituminous Coal Assn. v. De Benedictis, supra*, 480 U.S. at pp. 485-492.) The court also looked to the second factor of the *Agins* test and found that in any event the

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essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken (citation omitted) the question necessarily requires a weighing of private and public interest. . . . Appellants [in the *Agins* case] . . . will share with other owners the benefit and burdens of the city's exercise of its police power. Assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that appellants may suffer." (447 U.S. at pp. 260-262.)

In *Agins*, the Supreme Court was called upon to apply this test to a zoning ordinance which limited landowners to one residence on each acre of land. The court found the prevention of premature urbanization was a "legitimate state interest" and a limitation of one dwelling per acre "substantially advanced" this interest. It further found the landowner shared in these public benefits which helped offset any diminution of market value he might suffer. Accordingly, the regulation imposing the limitation was not an unconstitutional "taking" of the landowner's property and the landowner was not entitled to compensation.

In a case decided the same term as *First English* the Supreme Court applied this same basic test to strike down a condition the California Coastal Commission imposed on a owner of beachfront property (*Nollan v. California Coastal Commission, supra*, 483 U.S. 825). This condition required the owner to grant an easement allowing public access to the

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"subsidence" statute did not represent a taking of "all use" since the mineowners could still take out substantial amounts of coal without disturbing the surface.

For reasons discussed in the next section, the instant case resembles *Keystone Bituminous Coal* much more than it does *Pennsylvania Coal*. However, here the public safety concerns are far more dominant than they are even in *Keystone Bituminous Coal*.

beach in front of his home. The Supreme Court added a refinement to the test. The government's regulation — in this case, a condition — must substantially advance the precise state interest which avowedly motivated the regulation. The *Nollan* majority found the condition imposed — an easement affording *physical* access to the beach — did not substantially advance the avowed purpose of enhancing *visual* access to the beach.

II. FIRST ENGLISH IS NOT ENTITLED TO COMPENSATION BECAUSE THE INTERIM ORDINANCE DID NOT DEPRIVE IT OF "ALL USES" OF LUTHERGLEN AND WHATEVER USES WERE DENIED WERE PROPERLY DENIED TO PRESERVE PUBLIC SAFETY

One pair of commentators suggests the Supreme Court has held a private landowner is entitled to compensation when a land use regulation *either* does not substantially advance a legitimate public purpose *or* deprives the landowner of "all uses" of the property. (Falik and Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence, supra*, 23 Real Property, Probate & Trust J. 1.) To put it another way, they construe the Supreme Court's decision in *Agins v. City of Berkeley, supra*, to mean landowners are entitled to compensation if the land use regulation deprives them of "all uses" of the property even if the regulation involved substantially advances a legitimate public purpose. They admit there is conflict between this "either/or" test and some of the crucial language in Justice Rehnquist's majority opinion in *First English*. There, as will be recalled, the Supreme Court majority clearly stated the land use regulation involved in this case — Interim Ordinance 11,855 — would *not* constitute a compensable "taking" if the regulation did not deprive First English of "all use" of its property *or* even assuming it prohibited "all uses"

if that deprivation of "all uses" promoted public safety. Under this formulation First English would not be entitled to compensation even if Interim Ordinance 11,855 deprived it of "all uses" of Lutherglen if that prohibition substantially advances the interest in public health and safety.

If necessary, we could readily reconcile the *Agins* formulation and the *First English* formulation. In *Agins* the public purpose advanced was the interest in preventing premature urbanization (with premature urbanization defined as development in excess of one home per acre). The Supreme Court might have difficulty finding that this public purpose would justify depriving a landowner of "*all* use" of his property. However, the Supreme Court recognized the public purpose in *First English* is far different — the preservation of lives and health. It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health. So it makes perfect sense to deny compensation for the denial of "all uses" where health and safety are at stake but require compensation for the denial of "all uses" where the land use regulation advances lesser public purposes. Indeed it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them "the right" to use property which cannot be used without risking injury and death.[10]

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[10] This reconciliation of the two formulations finds considerable support in another opinion filed during the same term as *First English — Keystone Bituminous Coal Assoc. v. De Benedictis, supra*, 480 U.S. 470. "Many cases . . . have recognized that the nature of the State's action is critical in takings analysis. (Fn. omitted.).... The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*.... [O]ne of the State's primary ways of preserving the public weal is restricting

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We need not choose between the *Agins* and *First English* formulations of the test, however. Interim Ordinance 11,855 survives under either formulation. It did not deny First English "all use" of the property and the uses it did deny could be constitutionally prohibited under the County's power to protect public safety.

True, the complaint *alleges* Interim Ordinance 11,855 denies First English "all use" of Lutherglen. But as will be seen shortly, the ordinance *does not* deny First English "all use" of this property. It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and the construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the reconstruction of demolished buildings or the erection of new ones. *As far as this ordinance is concerned*, many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched. (If Lutherglen had been a factory or a coal mine, these sorts of uses would have meant little to the landowner. But Lutherglen is a camping facility. So uses of value to that purpose remained available during the time the interim ordinance was in effect.)

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the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it. . . . As the cases . . . demonstrate, the public interest in preventing nuisances is a substantial one, which in many instances has not required compensation." (480 U.S. at pp. 488-489, 491, 492.) As we do in the instant case, however, the Supreme Court found it unnecessary to rest its decision solely on this grounds since the mineowners retained some uses of their property. (*Ibid.*)

Given the serious safety concerns demonstrated by the May 1978 flood, the County might well have been justified in prohibiting entirely any human occupancy or other use whatsoever of Lutherglen until it had completed a thorough study and determined precisely what, if any, occupancy and uses were compatible with the public safety. However, we need not address that issue in this case since Interim Ordinance 11,855 did *not* by its terms preclude "all uses" of this property.

The issue actually raised is whether the County could constitutionally do what it did in Interim Ordinance 11,855 — prevent the construction of any buildings in Lutherglen on an interim basis. It is to this issue we now turn.

To properly apply the constitutional test to respondents' regulatory action in this case requires that we take a closer look at the interim flood control ordinance itself as well as other relevant land use provisions. We are reviewing a judgment on the pleadings and ordinarily would be confined to the allegations of the complaint. However, an appellate court is allowed to take account of matters which can be judicially noticed (Code Civ. Proc., § 430.30(a); *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997; 4 Witkin, Cal. Procedure, 3d ed. 1985) Pleading, §§ 394, 395; 5 Witkin, Cal. Procedure, *supra*, § 896.) This includes legislative acts and enactments (*People v. Oakland Water Front Co.* (1897) 118 Cal. 234, 245; *Livermore v. Beal* (1937) 18 Cal.App.2d 535; 4 Witkin, Cal. Procedure, *supra*, § 395). We have taken judicial notice of the disputed interim ordinance, County Ordinance No. 11,855, the subsequent permanent flood control ordinance, and a variety of other county ordinances bearing on this particular property.

First English's camp, Lutherglen, is located in an area which was and is zoned "R-R" (Resort and Recreation). A youth camp such as this is allowed within this zone only pursuant to a "Conditional Use Permit." At the time of the flood, the camp grounds included two bunk houses, a dining

hall, a caretaker's lodge, and an outdoor chapel. After the February 1978 flood swept away most of these structures and those of other camps in the Mill Creek flood way, the County adopted County Ordinance No. 11,855 as an interim measure. This ordinance was enacted on January 11, 1979, and provides in pertinent part:

"A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs,. . . .

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"Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area *and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area.* If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made [because of the "grandfather" provisions of the zoning code]." (Emphasis in original.)

By its terms, this ordinance temporarily prohibited appellant from rebuilding the structures lost to the February 1978 flood while the County studied what permanent measures it would have to take to prevent a recurrence of that deadly event. The interim ordinance did not affect eight of the twenty-one acres on the Lutherglen site because they were not in the flat land near the river channel.

Appellant's "regulatory taking" cause of action was predicated solely on this temporary interim ordinance. Nor has First English ever amended its complaint to allege the permanent flood control ordinance enacted in 1981 constituted a "taking" of its property. Nonetheless, it is helpful to an understanding of the temporary measure to consider the terms of the permanent ordinance.

On November 8, 1980 — 22 months after the interim ordinance went into effect and 21 months after First English filed its lawsuit — the Los Angeles County Regional Planning Commission issued a report on a proposed permanent Flood Protection District encompassing the Mill Creek area. The commission found: ". . . [T]he subject property [restriction] represents one strategy in Los Angeles County's comprehensive program *to insure compliance with the requirements of the Federal Flood Protection Program by designation of a flood protection area along the stream bed of Mill Creek*; . . . [T]his will be accomplished by the prohibition of buildings and major structures within the area reserved for flood flows which includes both the existing wash or channel and additional area as may be necessary to provide reasonable protection from overflow of flood waters, bank erosion, and debris deposition; . . . *[A]ll affected parcels still will have buildable areas*; . . . Establishment of the proposed district at such location is in the interest of public health, safety, and general welfare. . . ." (The Regional Planning Commission, County of Los Angeles, Flood Protection Case No. 3-(5) November 8, 1980, italics added.)

Pursuant to the commission's findings and recommendations the Board of Supervisors enacted Ordinance No. 12,413. This ordinance, adopted August 11, 1981, created the Mill Creek Flood Protection District and superseded the interim flood protection district of Ordinance No. 11,855. The permanent building restriction encompasses the same area as the interim ordinance had. This permanent ordinance recites as its purpose: "The flood protection district is

established as a supplemental district for regulation of property within areas designated by the Chief Engineer of the Los Angeles County Flood Control district as subject to substantial flood hazard. Such district includes both the existing wash or channel and additional area as necessary to provide reasonable protection from overflow of floodwaters, bank erosion, and debris deposition."

Among other things, the permanent ordinance prohibits construction or reconstruction of most buildings within the district. The exceptions, however, do permit "accessory building structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems approved by the county engineer . . . [a]utomobile parking facilities incidental to a lawfully established use . . . [and] [f]lood control structures. . . ." (§ 22.44.220.) Another provision instructs the county engineer to "enforce, as a minimum, the current Federal flood plan management regulations" when considering whether to issue building permits for buildings or other structures in this flood control zone.

If there is a hierarchy of interests the police power serves — and both logic and prior cases suggest there is — then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. More often these laws guard against things like "premature urbanization" (*Agins v. Tiburon, supra*, 447 U.S. 255), or "preserve open spaces" [*Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600), or contribute to orderly development and the mitigation of environmental impacts (see, e.g., *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365; *Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App.3d 259). When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights (see, e.g., *Desert Outdoor Advertising v. County of San Bernardino* (1967) 255 Cal.App.2d 765).

Nonetheless, it should be noted even these lesser public interests have been deemed sufficient to justify zoning which diminishes — without compensation — the value of individual properties. (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, (1971) 44 So.Cal.L.Rev. 1, and cases cited therein.)

The zoning regulation challenged in the instant case involves this highest of public interests — the prevention of death and injury. Its enactment was prompted by the loss of life in an earlier flood. And its avowed purpose is to prevent the loss of lives in future floods. Moreover, the lives it seeks to save and the injuries it strives to prevent are not only those on other properties but on appellant's property as well.

We need not address the ultimate question — is the public interest at stake in this case so paramount that it would justify a law which prohibited *any* future occupancy or use of appellant's land. Certainly, the owners of red cedar trees were not entitled to any public compensation when the state required them to destroy those trees in order to save the "lives" of apple trees in *Miller v. Schoene, supra*. But the zoning limitation in the instant case is nowhere near as Draconian. Zoning for this property allowed several uses of Lutherglen throughout the term of the interim ordinance First English challenges. During that period and after enactment of the permanent ordinance, as well, this property could be used for "agricultural, and recreational uses." And under the permanent ordinance First English appellants are specifically allowed to build swimming pools, parking lots, and accessory buildings within the flood zone portion of its property. (Since First English does not allege it has been denied permits to build any alleged "accessory buildings" we cannot know the scope of this exception.) What First English can no longer do is rebuild the bunkhouses and similar permanent living structures which might house the potential victims of a future flood or if carried away by that flood cause death,

injury and property damage to other properties further downstream.

We have no problem concluding these zoning restrictions represent a valid exercise of the police power and not an unconstitutional "taking without compensation." On balance, the public benefits this regulation confers far exceed the private costs it imposes on the individual property owner (especially after factoring in the public benefits this property owner shares). These are the considerations the Supreme Court deemed to control the decision whether government should be compelled to award compensation when its regulations drastically limit the uses of private property. (*Agins v. Tiburon, supra*, 447 U.S. 255, 260-262, see Discussion at pages 18-19, *supra*.) On one side of the scale the zoning restriction "substantially advances" the highest possible public interest — the prevention of death and injury both on and off appellant's property. On the other side of the scale, appellants and their future campers not only share in this public benefit but are still left with some permissible uses of the property. The fact the zoning restrictions necessary to the preservation of life and health may cause a diminution in the use and economic value of this property does not create a legal entitlement to compensation for that loss of use and value. (*Goldblatt v. Town of Hemstead, supra*, 369 U.S. 590; *Hadachek v. Sebastian, supra*, 239 U.S. 394; see *Keystone v. De Benedictis, supra*, 480 U.S. 470.)

This case presents a dramatic illustration of the principle of "reciprocity of advantage." Lutherglen is one of several properties running along this riverbed. Those who use Lutherglen are endangered by any structures that may be built on these other properties, just as those using the other properties are endangered by structures First English might erect on Lutherglen. First English enjoys the safety benefits accompanying the prohibition of construction on the other properties along the riverbed in return for the "reciprocal"

safety benefits that flow to the other landowners because First English is subject to a similar ban.

The instant complaint contains no allegations controverting the legislative history nor does it present other facts we are entitled to judicially notice casting doubt on the avowed intent and effect of the interim ordinance. Indeed, after reciting the terms of the now-superseded ordinance the sole allegation is that "Ordinance No. 11,855 denies First Church all use of Lutherglen." The complaint does not allege the limitations imposed on First English's use of the property were motivated by a desire to acquire Lutherglen at a lower price or that it was unreasonable for the County to conclude these limitations would contribute substantially to the public safety.

The government is entitled to a presumption its regulations are motivated by and reasonably serve their avowed purposes (*Morse v. San Luis Obispo County, supra*, 247 Cal.App.2d 600) which can only be overcome by specific allegations and proof. In the instant case, it is abundantly clear from the interim ordinance and related judicially noticed facts that the avowed purpose of this ordinance was to protect lives and health. There can be no serious contention under *Nollan* that the regulation fails to "substantially advance" the precise "legitimate state interest" the county avows prompted the interim and permanent ordinances. Restricting the erection of structures in the flood zone along the river is calculated to substantially advance the state's legitimate interest in preventing injury and death during the next flood. Accordingly, we are satisfied that the instant complaint does not state a valid claim for a compensable taking. In the words of Chief Justice Rehnquist, the ordinance did not "actually [deny] appellant all use of its property" and in any event "the denial of all use was insulated as a part of the State's authority to enact safety regulations." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 313.)

III. THE INTERIM ORDINANCE IS FURTHER JUSTIFIED AS A REASONABLE TEMPORARY LIMITATION ON CONSTRUCTION TO MAINTAIN THE STATUS QUO WHILE THE COUNTY DETERMINED WHAT, IF ANY, STRUCTURES WERE COMPATIBLE WITH PUBLIC SAFETY.

As an independent and sufficient grounds for our decision, we further hold the interim ordinance did not constitute a "temporary unconstitutional taking" even were we to assume its restrictions were too broad if *permanently imposed* on First English. This interim ordinance was by design a temporary measure — in effect a total moratorium on any construction on First English's property — while the County conducted a study to determine what uses and what structures, if any, could be permitted on this property consistent with considerations of safety. We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional "temporary takings" requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope. On its face, Ordinance 11,855 is reasonable in all these dimensions.

The ordinance had the legitimate avowed purpose of preserving the status quo while the County studied the problem and devised a permanent ordinance which would allow only safe uses and the construction of safe structures in and near the river bed. The restrictions in Ordinance 11,855 were reasonably related to the achievement of this objective. Given the seriousness of the safety concerns raised by the presence of any structures on this property, we find it was entirely reasonable to ban the construction or reconstruction of any structures for the period necessary to conduct an extensive study and fully develop persuasive evidence about what, if any, structures and uses would be compatible with

the preservation of life and health of future occupants of this property and other properties in this geographic area.

We do not find the ordinance remained in effect for an unreasonable period of time beyond that which would be justified to conduct the necessary studies of this situation and devise a suitable permanent ordinance. The study was completed and a report containing recommended restrictions submitted in less than two years. County decision-makers took another six months to hold hearings, ponder and pass the somewhat less restrictive permanent ordinance. These periods are reasonable especially given the complexity of the issues to be studied and resolved. Nor were the restrictions imposed by the interim ordinance unreasonable in scope given the seriousness of the danger posed by the construction of new structures in Lutherglen and nearby properties. We cannot say that without a thorough-going study it would have been reasonably feasible to identify *any* structure which could be safely permitted on these properties. Thus we find the time taken by this study and the time this interim ordinance remained in effect to be well within the bounds of reason. The County owed this landowner no special duty to give priority to the study of Lutherglen over the study of other properties which might pose a danger to safety. Nor did it owe any of these landowners a duty to cut any corners in the study or take any risks that anything might be overlooked which could produce a permanent ordinance less restrictive than public safety concerns demanded.

IV. SINCE THERE WAS NO UNCONSTITUTIONAL "TAKING" OF LUTHERGLEN, FIRST ENGLISH HAS NOT STATED A CAUSE OF ACTION ENTITLING IT TO COMPENSATION

Since we hold the instant complaint is insufficient to state a cause of action that the limitations imposed by the interim ordinance represented an unconstitutional "taking" of First English's property it follows First English is not entitled to compensation for a "temporary taking" between the time the interim ordinance was enacted and it was superseded by the somewhat less restrictive permanent ordinance. The Supreme Court's majority opinion in *First English* held property owners are entitled to compensation for so-called "temporary takings," but only where the government regulation in question is ultimately ruled to have worked an unconstitutional taking. "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. . . . We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at pp. 319, 321.) Here we find interim ordinance 11,855 did not "work a *taking* of all use" of appellant's property. Consequently, there is no "duty to provide compensation for the period during which [that ordinance] was effective."

DISPOSITION

The judgment dismissing the cause of action for inverse condemnation based on enactment of Ordinance 11,855 is affirmed for the reasons recited in this opinion. In all other respects the opinion this court filed on June 25, 1985, and in which remittitur issued on November 4, 1985, remains in full force and effect. Accordingly, the case is remanded for further proceedings consistent with that opinion as to the cause of action for inverse condemnation based on cloud seeding.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (FRED), J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL
SECOND DIST.
FILED
JUNE 23, 1989
Robert N. Wilson, Clerk

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
CALIFORNIA, and LOS ANGELES
COUNTY FLOOD CONTROL DISTRICT,
Defendants and Respondents.

NO. B003702
(Super.Ct. No. C 273634)

ORDER MODIFYING OPINION
AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on May 26, 1989, be modified in the following particulars:

1. On page 21, line 5 from the top of the page change the word "use" to "uses" and on line 6, after the words "all uses" insert "of that property" so the complete sentence now reads:

> "There, as will be recalled, the Supreme Court majority clearly stated the land use regulation involved in this case — Interim Ordinance 11,855 — would *not* constitute a compensable "taking" if the regulation did not deprive First English of "all uses" of its property *or* even assuming it prohibited "all uses" of that property if that deprivation of "all uses" promoted public safety."

2. On page 22, last sentence of footnote 10, delete the word "(*Ibid.*)."

3. On page 23, line 11 of the first full paragraph, insert "First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was*" before the word "*concerned*" so the sentence now reads:

> "First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was concerned*, many camping activities could continue on this property."

4. On page 31, line 10 from the bottom of the page substitute the words "an automatic" for the word "a" so the sentence now reads:

> "The fact the zoning restrictions necessary to the preservation of life and health may cause a diminution in the use and economic value of this property does not create an automatic legal entitlement to compensation for that loss of use and value".

Appellant's petition for rehearing is denied.

No change in judgment.

APPENDIX C

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Seven, No. B003702 — S010941

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH GLENDALE,
Appellant
v.
COUNTY OF LOS ANGELES,
Respondent.

Appellant's petition for review DENIED.

Lucas, C.J., Panelli, J. and Kaufman, J., are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX D

LOS ANGELES COUNTY ORDINANCE NO. 11,855.

An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

The Board of Supervisors of the County of Los Angeles does ordain as follows:

Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though full set forth.

Section 2. Violation of this ordination is punishable by a fine of not more than five hundred dollars ($500) or imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment. Each day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted, constitutes a separate offense.

Section 3. If any provision or clause of this ordinance or the application thereof to any persons or circumstances is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain

management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof.

LOS ANGELES COUNTY CODE §22.44.010.
SUPPLEMENTAL DISTRICTS DESIGNATED.

As used in this Title 22, "supplemental districts" means:

A. Equestrian districts;
B. Setback districts;
C. Flood protection districts;
D. Community standards districts.
(Ord. 1494 Ch. 9 Art. 1 § 901, 1927.)

LOS ANGELES COUNTY CODE §22.44.020.
USE RESTRICTIONS. A person shall not use any premises in any supplemental district except as hereinafter specifically permitted in this Title 22, and subject to all regulations and conditions enumerated in this title.
(Ord. 1494 Ch. 9 Art. 1 § 901.1, 1927.)

LOS ANGELES COUNTY CODE §22.44.220.
BUILDING RESTRICTIONS. A person shall not use, erect, construct, move onto or, notwithstanding Subsections B and C of Section 22.56.1510, alter, modify, enlarge or reconstruct any building or structure within the boundaries of a flood protection district except as provided herein:

A. Accessory buildings and structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems, approved by the County Engineer pursuant to Section 308 of Ordinance 2225, the Building Code, set out at Title 26 of this code;

B. Automobile parking facilities incidental to a lawfully established use;

C. Flood-control structures approved by the Chief Engineer of the Los Angeles County Flood Control District. (Ord. 1494 Ch. 9 Art. 4 § 904.2, 1927.)

LOS ANGELES COUNTY CODE §22.44.230.
LISTS OF DISTRICTS. The following flood protection districts are added by reference, together with all maps and the provisions pertaining thereto:

District Number	District Name	Ordinance Of Adoption	Date of Adoption
	* * *		
3	Mill Creek	12413	8-11-81

(Ord. 12413 § 1, 1981)

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

First English Evangelical Lutheran Church
of Glendale, a California corporation,
Petitioner,
vs.
County of Los Angeles, California,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

DEWITT W. CLINTON
COUNTY COUNSEL
CHARLES J. MOORE
Prin. Deputy County Counsel
500 West Temple Street
Los Angeles, CA 90012

JACK R. WHITE, ESQ.
HILL, FARRER & BURRILL
445 South Figueroa Street
35 Floor, Union Bank Bldg.
Los Angeles, CA 90071

That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioner herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On November 21, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore Matsuo Wilden
Notary Public in and for
said county and state

No. 89-826

In The

Supreme Court of the United States

October Term, 1989

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California Corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Seven

RESPONDENT'S BRIEF IN OPPOSITION

DeWitt W. Clinton
County Counsel
Charles J. Moore
Principal Deputy County Counsel

Jack R. White*
Darlene F. Phillips
Dean E. Dennis
Hill, Farrer & Burrill
445 South Figueroa Street
34th Floor – Union Bank Square
Los Angeles, California 90071
(213) 620-0460

Attorneys For Respondent
*Counsel Of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

No. 89-826

In The

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Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Seven

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, County of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven.

STATEMENT OF THE CASE

A. The Petition's False Premises.

The questions framed in the petition and reasons asserted for granting the writ rest entirely on false premises. In particular, petitioner repeatedly misstates what occurred on remand from this Court's prior decision. The Court of Appeal did not violate this Court's instructions on remand, let alone "thumb its nose" at those instructions. [Pet., p. i (Question 1), pp. 3, 7-14, 28] Nor did it "defy" any of this Court's holdings. [Pet., pp. 2-3, 7, 18] On the contrary, the Court of Appeal simply decided the precise issues which this Court said remained open on remand, and did so *entirely* in accordance with the legal precepts and standards established by this Court.

As the Court of Appeal pointed out, this Court was careful to limit its 1987 holding in the instant case to the ~~r issue of~~ whether the Fifth Amendment mandates payment of compensation *if* a land use regulation is determined to have gone so far as to amount to a regulatory "taking" of property. Because of the procedural posture in which the case came before this Court after the Court of Appeal's original decision, this Court was able to isolate and decide that remedy issue, without deciding whether respondent's Interim Flood Protection Ordinance actually amounted to a taking. [Pet. (Opinion), pp. A2, A5-A10] Nor did this Court purport to express any opinion as to the adequacy of petitioner's complaint under California pleading rules to allege sufficient *facts* (as

distinguished from bare conclusions) to be entitled to a trial on that issue.[1]

After addressing those open issues on remand, the Court of Appeal concluded that petitioner had failed to allege sufficient facts to state a cause of action for an unconstitutional regulatory taking of its property. Accordingly, the trial court's judgment dismissing petitioner's inverse condemnation claim based on the ordinance was affirmed on this new ground, and the case was remanded to the trial court for further proceedings on one of petitioner's *other claims*, in accordance with the appellate court's 1985 decision. [Pet. (Opinion), pp. A2, A28-A29] The basis for its determination that no taking claim had been stated was succinctly summarized by the Court of Appeal as follows:

> "We decide appellant failed to state a cause of action for two independent and sufficient reasons: (1) The interim ordinance in question substantially advanced the preeminent state interest in the public safety and did not deny appellant all use of its property. (2) The interim ordinance only imposed a reasonable moratorium for a

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[1] It should be noted that Appendix A to the Petition, setting out the Court of Appeal's opinion, contains a typographical error on page A2 which changes the meaning of the sentence. On line 4, the word "no" is actually "an". The sentence should read: "The high court held a landowner is entitled to compensation – not merely injunctive relief – when a court finds there has been *an* unconstitutional regulatory taking." (Emphasis added) Appendix A also does not reflect the changes made by the Court in its June 23, 1989 order modifying the Opinion. [Pet., Appendix B, pp. B1-B2] The published Opinion (210 Cal.App.3d 1353) does include these corrections, as well as a corrected identification of counsel for respondent on remand.

> reasonable period of time while the respondent conducted a study and determined what uses, if any, were compatible with public safety." [Pet. (Opinion), p. A2]

Petitioner's repeated assertions that the Court of Appeal decided these issues "without any factual record" are *absolutely false*. [Pet., pp. 2-3, 7-12, 28] As we will discuss more fully *infra*, the court properly took judicial notice of the actual provisions of the disputed Interim Flood Protection Ordinance, the permanent ordinance which later replaced it, the County Planning Commission's findings and recommendations that led to the adoption of the permanent ordinance, and various other provisions of respondent's zoning and building codes applicable to the subject property. [Pet. (Opinion), pp. A19-A22] In addition, there was in fact a *trial* in this case, on *other related causes of action*, prior to the original appeal.[2] The record on appeal contained a *wealth of evidence* adduced in that trial concerning the location and character of the petitioner's property and the devastating effects of the flood. [Pet. (Opinion), pp. A2-A5] This provided the Court of Appeal with more than enough record to justify its conclusion that petitioner failed to allege sufficient facts to establish a regulatory taking of its property, and could not possibly do so.

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[2] Petitioner also contended that respondent and the Los Angeles County Flood Control District were liable for the destruction of all of the buildings and improvements on petitioner's campground property, caused by the very flood which led to the adoption of the Interim Flood Protection Ordinance. [Pet. (Opinion), pp. A4-A5]

B. Nature And Uses Of Petitioner's Property Prior To The Flood and Ordinance.

Petitioner's property consists of a 21 acre private campground known as "Lutherglen," located in the mountains of the Angeles National Forest, north of the city of Los Angeles, about 23 miles from the suburban city of Glendale. [Pet. (Opinion), p. A2; Complaint, Clk. Tr. 6; Rep. Tr., 245-247, 316, 318]

Lutherglen is located in a narrow canyon. Mill Creek, which flows through the canyon, is a natural water course fed by drainage from the surrounding mountains. [Pet. (Opinion), pp. A2-A3] Petitioner purchased the property in 1957 and, over the next 20 years, built various structures and recreational facilities on the premises using mostly donated labor and services. These improvements included a dining hall, bunk house, caretaker's lodge, outdoor chapel, swimming pool, volleyball court, and a footbridge across Mill Creek. [Pet. (Opinion), p. A2; Rep. Tr., 317-318, 332, 348, 392, 476] All of the buildings and other structures in Lutherglen (except two water tanks) were located on 12 acres of "flat" land at the bottom of the canyon along the sides of the creek. [Pet. (Opinion), p. A2; Rep. Tr., 247]

Lutherglen was zoned "R-R" (Resort and Recreation) which is a classification established to provide for outdoor recreation and agricultural uses suitable for development without significant impairment to the resources of the area. [Pet. (Opinion), p. A19; County Zoning and

Planning Code §22.40.180.][3] The "R-R" zone prescribes numerous *permitted* uses (§22.40.190), which include, just to mention a few, archery ranges, campgrounds, fishing and casting ponds, golf courses, parks, riding and hiking trails, volleyball and badminton courts and swimming pools; but *not* the type of "youth camp" which petitioner operated on the property. The "R-R" zone also prescribes *accessory* uses (§22.40.200), which include accessory buildings and structures commonly used in connection with the permitted uses in the zone; *approved* uses (§22.40.210), which are subject to the planning director's approval; and *special* uses (§22.40.220), which require a "conditional use permit." It is only the last category which permits "youth camps." Hence, petitioner's use of Lutherglen for that purpose was permissible only pursuant to a "conditional use permit."[4] [Pet. (Opinion), p. A19]

Accordingly, even prior to the adoption of respondent's Interim Flood Protection Ordinance, the available uses of Lutherglen were relatively limited because of its

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[3] The pertinent provisions of respondent's Zoning and Planning Code, of which the Court of Appeal took judicial notice, were set out in the Appendix to respondent's supplemental brief on remand. Those same provisions also were set out in Appendix C to the Brief of Appellee filed in the previous proceeding before this Court.

[4] A "conditional use permit," like a variance or other exception granted from zoning ordinances, is not granted as a matter of right. Rather, it is "the grant of dispensation [which] is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body." *Rubin v. Board of Directors* (1940) 16 Cal.2d 119, 124; *Rasmussen v. County of Orange* (1963) 212 Cal.App.2d 246, 248.

location, topography and the "R-R" zoning which petitioner has not challenged.

C. The Flood And Resulting Destruction Of Lutherglen.

In July 1977, a fire destroyed approximately 3,860 acres of the watershed area upstream of Lutherglen, creating a serious potential flood hazard. [Pet. (Opinion), pp. A2-A3] Based on *petitioner's own pleadings* and the *evidence received in the trial*, the Court of Appeal was able to give this graphic description of the flood that followed:

> "On February 9 and 10, 1978, a disaster waiting to happen finally arrived. A storm droped a total of 11 inches of water in the watershed area. A giant wall of water rushed toward the fragile structures people had erected on the banks of the creek. The docile, often dry creek became a raging river and overflowed the banks of the Middle Fork and Mill Creek. The highway's culverts at MM 16.56 were inadequate to handle the volume of water. The flood drowned ten people in its path, swept away bridges and buildings, and inflicted millions of dollars in losses. Fortuitously, Lutherglen's planned camp for handicapped children scheduled for that week had been postponed. So no lives were lost on its property when the surging waters engulfed Lutherglen and destroyed its buildings." [Pet. (Opinion), pp. A3-A4]

D. The Interim Flood Protection Ordinance.

On January 11, 1979, respondent adopted Ordinance No. 11,855, as an "interim ordinance temporarily prohibiting the construction, reconstruction, placement or

enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs." It took effect immediately as an urgency measure, "required for the immediate preservation of the public health and safety."[5]

As the Court of Appeal observed, this ordinance "temporarily prohibited appellant from rebuilding the structures lost to the February 1978 flood while the County studied what permanent measures it would have to take to prevent a recurrence of the deadly event." [Pet. (Opinion), p. A20] But the ordinance had no effect on the portion of petitioner's property which was "not in the flat land near the river channel." [Pet. (Opinion), p. A20]

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[5] Section 4 of the ordinance reads as follows:

> "Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area *and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area.* If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made [because of the 'grandfather' provisions of the zoning code]." (Emphasis in original.) [Pet. (Opinion), p. 20]

Moreover, it did not deny "all use" of the property (not even the flat portion), despite petitioner's conclusory claim that it did. The court described the still permissible uses as follows:

> "It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the construction of demolished buildings or the erection of new ones. First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was concerned,* many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched. (If Lutherglen had been a factory or coal mine, these sorts of uses would have meant little to the landowner. But Lutherglen is a camping facility. So uses of value to that purpose remained available during the time the interim ordinance was in effect.)" [Pet. (Opinion), p. A18, as amended, p. B2]

Thus, the petition is patently incorrect and misleading when it states that "[t]he effect of the ordinance is to convert Lutherglen into part of the channel which collects mountain runoff and transports the water to a downstream reservoir for storage." [Pet., p. 5] The ordinance did not *convert* Lutherglen into a part of the channel or create anything new. Lutherglen already was situated precisely within a *natural* drainage channel. The ordinance merely prevented petitioner from rebuilding in the same place what had been swept away *by nature.*

Finally, petitioner further attempts to mislead the Court by stating, "[t]wo and half years later the temporary prohibition was made permanent". [Pet., p.4] Under the provisions of California Government Code Section 65858, as they existed at the time the Interim Flood Protection Ordinance was enacted, any such ordinance which took effect immediately as an urgency measure "to protect public safety, health and welfare" could remain operative *no more than four months*, unless it was extended in accordance with certain strict statutory procedures. The *maximum* period it could remain in effect with all permissible extensions was *two years*. It is undisputed that Ordinance No. 11,855 was extended by appropriate action of the County for the maximum period permitted, but it necessarily expired after *two years*, some seven months before respondent adopted a permanent ordinance on August 11, 1981. Furthermore, the provisions of the permanent ordinance were not as restrictive as those of the interim ordinance. [Pet. (Opinion), pp. A21-A22]

E. **Respondent's Permanent Flood Protection District.**

Respondent's Ordinance No. 12,413, adopted August 11, 1981, created the Mill Creek Flood Protection District encompassing the same area as the interim flood protection area established by Ordinance No. 11,855. The less restrictive provisions of the permanent ordinance, and the County Planning Commission's findings which preceded its adoption, are discussed in the appellate court's opinion. [Pet. (Opinion), pp. A21-A22] The court observed that although petitioner has never amended its

complaint to allege that the permanent ordinance constituted a taking of its property, a review of that enactment is helpful to an understanding of the temporary measure. [Pet. (Opinion), p. A21]

In essence, the permanent ordinance prohibits the construction or reconstruction of *major* structures or buildings within the area designated as being subject to substantial flood hazard. But it allows the construction of "accessory building structures" within the district, if they will not impede the flow of water in the event the creek overflows its channel. This is consistent with what is referred to in the Opinion below as the "current Federal flood plain management regulations." Indeed, the ordinance was expressly adopted "to insure compliance with the requirements of the Federal Flood Protection Program." [Pet. (Opinion), pp. A21-A22][6] As the Court of Appeal observed, "[s]ince First English does not allege it

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[6] The "Federal Flood Protection Program" referred to in the Planning Commission's findings and Opinion below is the National Flood Insurance Program ("NFIP"). The NFIP makes federally subsidized insurance available to landowners of parcels located in flood prone areas, *if adequate local flood plain management laws have been enacted to minimize flood losses.* 42 U.S.C. §4001 et seq; 44 C.F.R. §§60.1, 60.2, 60.3. The regulations for compliance with the program require local agencies to adopt their own flood plain management regulations which, *inter alia*, "[p]rohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway that would result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. §60.3(d)(3). For a comprehensive discussion of the NFIP scheme, see *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 734-735 (5th Cir. 1988), discussed *infra*.

has been denied permits to build any alleged 'accessory buildings' we cannot know the scope of this exception." [Pet. (Opinion), p. A23]

F. The Pertinent Allegations Of Petitioner's Complaint.

Petitioner did not wait to find out what type of structures might be permitted on Lutherglen under the permanent flood protection ordinance that was contemplated on the face of Ordinance No. 11,855. Instead, petitioner commenced the instant action on February 21, 1979, a month and ten days after the Interim Flood Protection Ordinance was enacted. The *sole allegations* on which petitioner based its regulatory taking claim were: that on January 11, 1979, respondent adopted Ordinance No. 11,855, Section 1 of which prohibits construction or reconstruction within an "interim flood protection area located in Mill Creek Canyon"; that "Lutherglen is within the flood protection area created by Ordinance No. 11,855"; and that "Ordinance No. 11,855 denies First Church all use of Lutherglen." [Clk. Tr., 11, 12]

As previously pointed out, petitioner has never sought leave to amend its complaint in order to challenge the validity of the permanent flood protection ordinance, or to claim a taking based on that ordinance. Nor has petitioner ever sought permission to construct anything under the permanent ordinance. The trial in this case, which proceeded on other causes of action against respondent and the Flood Control District, did not commence until February of 1983, long after Ordinance No.

11,855 had expired by statute and the permanent ordinance had been enacted.[7]

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEAL DID NOT VIOLATE THIS COURT'S REMAND OR DENY DUE PROCESS BY DECIDING THAT PETITIONER HAD FAILED TO ALLEGE SUFFICIENT FACTS TO STATE A CAUSE OF ACTION FOR A REGULATORY TAKING

There is absolutely no merit to petitioner's contention that the Court of Appeal violated the remand order and "defied this Court's instruction to permit a factual determination of whether a taking had occurred," when it *decided that issue itself* instead of sending the case to the trial court. [Pet., pp. i (Question 1), pp. 7-10] This Court did not direct a remand to the trial court for "a factual evidentiary inquiry," as petitioner claims. Indeed, nothing in this Court's opinion purported to instruct or bind the California courts in any way regarding the *procedural*

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[7] Petitioner says that it did not amend its complaint to allege a taking under the permanent ordinance because it would have been a "futile gesture" to do so until the restrictive remedy rule established by *Agins v. City of Tiburon* (1979) 24 C.3d 266 was finally overruled by this Court. [Pet., p. 5, n. 4] But that rule only prevented petitioner from seeking compensation for any alleged regulatory taking of its property. Petitioner was at all times perfectly free, even under the California Supreme Court's *Agins* decision, to amend its pleading (or bring a separate action) for the purpose of having the permanent ordinance declared to be *invalid*, if petitioner believed it constituted an unconstitutional taking of its property. Likewise, petitioner was free to seek a permit to build any "accessory structures" which could safely be placed on the property.

manner in which the taking issue was to be resolved on remand.

What the Court of Appeal did once the case was returned to the California courts was entirely proper under California rules of appellate review. In essence, the court held that it could uphold the trial court's dismissal of the claim at the pleading stage, *if* a demurrer could have been sustained for failure to state a cause of action. The court's Opinion correctly states (and petitioner does not dispute), "[i]t is well settled that a trial court's decision is not to be reversed merely because it was based on erroneous grounds if there is an alternative rationale which will support that judgment." [Pet. (Opinion), p. A7] Indeed, that same procedural rule is followed in the federal appellate courts. *Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6 (1970); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Hence, if petitioner's complaint failed to properly allege sufficient facts to state a cause of action under California pleading rules, and petitioner plainly could not amend to do so in light of the facts established by judicial notice and the evidence in the record, the judgment was *required* to be affirmed.

Unquestionably, the Court of Appeal correctly determined that petitioner did not state a cause of action under California pleading rules. Zoning regulations are presumed to be valid exercises of the State's police power which further the public safety and the general welfare. A party claiming that a zoning ordinance has taken property must plead *specific facts* which show that the ordinance was a "property taking device rather than a regulation of the use of land." *Morse v. County of San Luis*

Obispo (1967) 247 Cal.App.2d 600, 603; *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 943; *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328.[8] A bare conclusory allegation that a county ordinance deprives a property owner of all reasonable or beneficial use, without any supporting facts, is legally insufficient – especially where, as here, the subject ordinance shows *on its face* that beneficial uses are available. *Pan Pacific Properties Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244.

Indeed, California pleading rules expressly permit courts (including appellate courts) to look beyond the bare allegations of the complaint and consider "any matter of which the court is required to or may take judicial notice" in deciding whether a demurrer should be sustained for failure to state a cause of action. See California Code of Civil Procedure §430.30(a) and the other authorities cited in the opinion below (p. A19). The appellate court also correctly stated that the matters which can properly be judicially noticed include *legislative acts and enactments*. In addition to the authorities cited by the court, see California Evidence Code §§452, 459; *Pan Pacific Properties Inc. v. County of Santa Cruz, supra*, at 255, n. 2; *Edna Valley Assoc. v. San Luis Obispo County Coordinating Council* (1977) 67 Cal.App.3d 444, 449 (Resolutions of County Commission may be judicially noticed).

Petitioner complains that it objected to the court taking judicial notice of respondent's various legislative acts and enactments, but does not contend that it was

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[8] Likewise, respondent's ordinance was entitled to such a presumption under this Court's precedents. *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 595-596 (1962).

improper for the court to do so under California law. Instead, petitioner attempts to mislead this Court by totally mischaracterizing the nature of the matters which were judicially noticed as being "selective judicial notice . . . of a few facts from the County's planning files" [Pet., i (Question 2), pp. 5-6, n. 5], and "one-sidedly selected snippets of the County's files." [Pet., p. 10][9] In any event, the fact that the Court of Appeal refused to close its eyes to the actual provisions of respondent's Interim Flood Protection Ordinance and other pertinent enactments which disproved the conclusory allegations of the complaint, certainly does not raise a *federal* issue for review by this Court.

It also should be noted that what the Court of Appeal did here is precisely in accord with this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There, the California Supreme Court's decision did not rest solely on the remedy ground later disapproved in this Court's decision in the instant case. The California Supreme Court had also concluded that a demurrer was properly sustained to the appellants' cause of action for declaratory relief, on the ground that no taking had been adequately alleged. In a unanimous decision, this Court affirmed the California Supreme Court on that ground.

The complaint in *Agins* alleged that the zoning ordinance in question would "forever preven[t] . . . development for residential use," and "completely destro[y] the value of [appellants'] property for any purpose or use whatever. . . ." *Agins, supra*, 447 U.S. 259, n. 6. Despite such allegations, the California Supreme Court held that

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[9] Petitioner also complains that documents it requested to have judicially noticed were ignored. [Pet., p. 6, n. 5] But petitioner fails to disclose what those documents were and it offers no argument or authority as to why the court was *required* (or even *permitted*) to judicially notice them.

the ordinance, on its face, did not deny appellants all reasonable use of their property because it allowed them to build between one and five residences on the property. Hence, at the most, appellants had asserted a *mere diminution* in the value of the property, which is insufficient to amount to a taking. 24 Cal.3d at 277.

In affirming, this Court observed that because the appellants had made only a *facial challenge* to the ordinance, without submitting any development plan for the property, the constitutionality of the ordinance had to be judged on its face alone. In other words, the ordinance could not be considered to amount to a taking of appellants' property unless its *mere enactment* did so. *Looking at the face of the ordinance through judicial notice,* this Court agreed that its mere enactment did not take appellants' property because it did not deny all development or use as alleged. In so doing, this Court also *specifically rejected* appellants' contention that it was improper for the California Supreme Court to have taken judicial notice of the actual terms of the zoning ordinance for the purpose of rejecting the allegations of the complaint that such ordinance prevented all use of the land. This Court noted that such judicial notice was proper under the rules of California practice which we discussed above, and concluded as follows:

> "In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review. *The appellants' objections to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court.* (Citation)." (Emphasis added) 447 U.S. at 259, n. 6.[10]

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[10] To the same effect, see, *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 352, n. 8 (1986).

Accordingly, there is absolutely no merit to petitioner's contention that it was denied "due process" in this case. Petitioner's statement [at p. 10] that "[s]uch appellate judicial notice *of facts which were NOT judicially noticed by the trial court* has been repeatedly condemned by this Court as a violation of due process of law," is incorrect and deliberately misleading. Neither of the two cases cited by petitioner stands for that proposition and they have absolutely no application to the circumstances presented by this case.

In *Ohio Bell Telephone Co. v. Pub. Util. Commn.*, 301 U.S. 292 (1937), a violation of due process occurred because a state public utilities commission ordered a utility to make rate refunds, without a hearing, based on "judicial notice" of certain economic information *without any notice* to the utility that such information would be considered. To make matters worse, the judicially noticed information was not even made a part of the record, rendering judicial review of the commission's actions virtually impossible. It is hard to conceive of a fact situation more remote from the present case than that.

Similarly wide of the mark, is *Garner v. Louisiana*, 368 U.S. 157 (1961). There, the state attempted to justify a criminal conviction which it claimed had been *based* on judicially noticed "facts" about race relations in the South, even though such "facts" did not appear in the record, the defendant had never been given notice of them, and the record did not even show that the trial judge had actually considered them.

Thus, in both *Ohio Bell* and *Garner*, the claim was being made that the *lower* tribunal had based its decision on alleged judicially noticeable facts which did not appear in the record. Here, in contrast, the legislative enactments admittedly were judicially noticed for the first time on appeal, for the purpose of deciding whether

the complaint should be dismissed on a *different* ground than the one given by the trial court. As we have shown, that was entirely permissible under California law. Moreover, unlike *Ohio Bell* and *Garner*, petitioner *did receive prior notice* of the matters to be judicially noticed, and those matters are described on the face of the appellate court's opinion.[11]

2. THE COURT OF APPEAL CORRECTLY INTERPRETED AND APPLIED THIS COURT'S DECISIONS.

A. The Appellate Court Did Not Ignore This Court's "Guidance For Remand."

Petitioner contends that the Court of Appeal ignored or failed to understand this Court's "instruction" and "guidance for remand," to the effect that the Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference *amounting to a taking*." (Emphasis added) [Pet., pp. 12-13; see also, "Question 3," Pet., p. i.] As we have shown, however, the appellate court did not ignore or misunderstand this point at all. It simply concluded that petitioner was not entitled to any compensation *because* respondent's Interim Flood Protection Ordinance *did not amount to a taking*.

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[11] In California, a reviewing court may judicially notice any matters which could have been judicially noticed by the trial court, even though they were not presented to the trial court, so long as the reviewing court affords each party a reasonable opportunity to present to the court information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed. See, California Evidence Code §§ 455(a), 459(c); *People v. Terry* (1974) 38 Cal.App.3d 432, 439; *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 384.

But petitioner argues that "[t]he theme which permeates the Court of Appeal's opinion is that the County's flood protection program was necessary and therefore, the program *could not* result in a taking of First Church's property." [Pet., p. 13] Petitioner says that "idea" cannot be reconciled with this Court's above quoted conclusion that compensation is required for an "otherwise proper" interference with property [Pet., p. 13]; and, hence, the appellate court's "belief in the virtue of the County's action not only fails to satisfy the terms of the remand from this Court, it is *irrelevant*." (Emphasis added) [Pet., p. 14]

Petitioner has plainly misinterpreted both the Court of Appeal's decision and this Court's meaning. The court below did not hold that the ordinance was not a taking *solely* because it was necessary to protect lives and property. Conversely, this Court certainly did not mean that the Fifth Amendment necessarily requires compensation even though the particular interference with the landowner's use of his land is not only "proper," but needed to preserve lives and property. As we will demonstrate next, the Court of Appeal merely gave *great weight* to the importance of this factor in balancing the public and private interests, precisely as it was required to do under this Court's decision in *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488-492 (1987).

B. The Court Of Appeal Did Not Misconstrue The Importance Of The Public Safety Purpose In Its "Taking" Analysis.

The petition states that "[t]he Court of Appeal said it perceived a 'public safety exception' in this Court's jurisprudence which would permit the County to preclude all reasonable use of First Church's property without compensation." [Pet., p. 18] Petitioner then argues that the

appellate court misconstrued the cases it cites, because "[t]he extent of the use prohibition approved by the Court of Appeal in this case goes beyond anything this Court has ever countenanced"; and that while this Court has recognized that a *particular activity* or *specific use* amounting to a nuisance may be prohibited, "[i]n none of this Court's cases has the Court held that *all* reasonable use could be prevented without compensation." [Pet., pp. 18-19]

The first and most obvious response to this contention is that it *attacks a strawman*. As we have shown, the Court of Appeal expressly found that respondent's Interim Flood Protection Ordinance *did not deny all reasonable use of the property*. Hence, petitioner's entire argument rests on a patently false premise.

Second, the Court of Appeal certainly did not misconstrue or misapply this Court's decisions when it discussed what it referred to as the "public safety exception." [Pet. (Opinion), pp. A10-A16] What the court obviously meant by that is that this Court has long recognized that reasonable regulations prohibiting uses of land which are *harmful to the public's health and safety* are not "takings" within the meaning of the Fifth Amendment. The court correctly observed that the seminal decision on this point was *Muggler v. Kansas*, 123 U.S. 623 (1897).[12]

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[12] In *Muggler*, the rule and rationale were stated as follows:

> "A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . Nor can legislation of that character come within the 14th Amendment, . . . unless it is

(Continued on following page)

Muggler is quoted at length in the opinion below. The principles enunciated in *Muggler* were reaffirmed 100 years later in *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra,* 480 U.S. at 488-489, where this Court pointed out "that the nature of the State's action is critical in takings analysis." As the Court explained, "[t]he special status of this type of State action can also be understood on the simple theory that since *no individual has a right to use his property so as to create a nuisance or otherwise harm others,* the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity" (480 U.S. at 491, n. 20); and "[l]ong ago it was recognized that 'all property in this country is held under the *implied obligation that the owner's use of it shall not be injurious to the community.*' " (Emphasis added) 480 U.S. at 491-492

It is true that this Court has never held that *all* economically viable use of a parcel of property could be denied for reasons of public safety, but neither has the Court ever been faced with a case where all possible economically viable uses were dangerous. If that ultimate question were presented, the rationale of *Muggler* and

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> apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation to deprive the owner of his liberty and property, without due process of law. *The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."* (Emphasis added.) 123 U.S. at pp. 668-669.

Keystone surely would compel the conclusion that compensation is not required if a safety regulation necessarily leaves no economically viable use at all, because no such use is safe. As the Court of Appeal said:

> "[I]t would not be remarkable at all to allow government to deny a private owner 'all uses' of his property where there is no use of that property which does not threaten lives and health. . . . Indeed it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." [Pet. (Opinion), p. A17]

But the court *did not have to so hold* in the instant case, and did not do so, precisely because respondent's ordinance did not deny petitioner *all* beneficial use of its campground property. It only prevented – temporarily – a *specific* dangerous use, i.e., the building of any new structures in a high flood hazard area.[13]

Petitioner also contends that because it has been prevented from making any reasonable use of its property, it experiences no "reciprocity of advantage" from respondent's safety ordinance. From this premise, petitioner argues that the "central justification for substantial use preclusion" does not exist; rather, petitioner says it has been "singled out to be forced to 'donate' – without compensation – all reasonable use of [its] property for the

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[13] The appellate court's decision is in no way inconsistent with *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), as petitioner argues. [Pet., pp. 20-22] *Pumpelly* did not involve the prevention of any dangerous use of property. Rather, a landowner lost all use his property (including economically viable *harmless* uses) when it was *physically* invaded for the benefit of the public at large, as the result of *permanent flooding* from the construction of a dam. This distinction is both obvious and crucial.

greater good of the community." [Pet., pp. 22-24] This argument is fallacious for several obvious reasons.

First, "reciprocity of advantage" is only one of the rationales given for the rule. The *real* central justification for the rule is that no one has a "right" to use his property in such a way as to harm others. Second, the same restrictions which applied to petitioner's property also applied to the other properties located along Mill Creek in the canyon bottom. Since petitioner was free to carry on any camping and recreational activities on its property which did not require the construction of buildings, the building restrictions imposed on its neighbors necessarily would protect and benefit petitioner and its own invitees for the obvious reasons stated by the Court of Appeal. [Pet. (Opinion), pp. A24-A25][14]

C. The Court Of Appeal Applied The Correct Test In Rejecting Petitioner's Facial Attack On The Ordinance.

Petitioner contends that the Court of Appeal ignored this Court's standards for determining when a regulation violates the Fifth Amendment. [Pet. pp. i-ii (Questions 4, 5), pp. 16-18] The petition even calls the appellate court's opinion "defiant" in this regard. [Pet., p. 18] These claims are patently frivolous.

Since petitioner's challenge to respondent's ordinance was a mere *facial challenge*, the Court of Appeal correctly applied the standard prescribed by this Court for such challenges in *Agins v. City of Tiburon, supra*. The appellate court concluded that the mere enactment of the

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[14] In *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra*, this Court noted that "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491, n. 21.

ordinance did not amount to a regulatory taking, precisely because (1) it substantially advanced a legitimate state interest – indeed, the preeminent state interest in public safety; and (2) it did not deny appellant all economically viable use of its property. Petitioner acknowledges that this standard was "mentioned" by the court below, but says there is no way it could properly have been applied without a trial and evidence. [Pet. p. 17] In so doing, of course, petitioner ignores the fact that this Court itself applied that very standard in *Agins*, based only on the pleadings and judicially noticed provisions of the challenged ordinance. What we said previously in our first argument disposes of this spurious point as well.[15]

The fact that the Court of Appeal did not mention the so-called "reasonable investment backed expectations test" was not error for at least two reasons. First, petitioner *alleged no facts* to show how respondent's temporary moratorium on the reconstruction of buildings wiped out by the devastating flood could have interfered with any *reasonable* investment backed expectations it then had with respect to the property. Furthermore, this would be but one of several factors to be considered in connection with the "ad hoc factual inquiries" which this Court has said should properly be made *only* when there is a

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[15] Since this test is applied in "facial challenges" to a regulation, the only inquiry that is required is whether the property owner is left with some permissible, beneficial use of the property. So long as the remaining use is not obviously impracticable, its relative profitability or value is not relevant in a facial challenge. Hence, a property owner faces an "uphill battle" in making a facial attack. *Keystone, supra,* at 494-495; *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 294-296 (1981). To the same effect, see *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 981-982 (9th Cir. 1987).

so-called "as applied challenged" to a land use regulation, as distinguished from a mere "facial challenge." *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 190-191, n. 12 (1985); *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra*, at 494-495; *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, at 294-296 (1981). Hence, there was no need for the Court of Appeal to speculate on whether petitioner might have had any "reasonable investment backed expectations" that could have been interfered with, when it rejected petitioner's facial challenge to respondent's ordinance.

D. The Court Of Appeal Did Not Misinterpret Or Misapply *Nollan*.

Petitioner advances two contentions based on *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987). Both contentions are utterly without merit.

First, petitioner says that the Court of Appeal "examined the County's rationalization for its regulation by a relaxed standard of review which this Court disapproved two years ago," instead of subjecting it to "heightened scrutiny." [Pet., p. ii (Question 6), pp. 25-28] But the quote from *Nollan* appearing on p. 25 of the petition shows plainly that this Court was only saying that it was "inclined to be particularly careful" when "the *actual conveyance* of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk* that the purpose is avoidance of the compensation requirement rather than the stated police power objective." (Emphasis added) 483 U.S. at 481. Since respondent's ordinance in the instant case did not require petitioner to convey an interest in its property, the "heightened risk" referred to in *Nollan* is not present here.

The Court of Appeal did recognize, however, that *Nollan* adds "a refinement to the test" – i.e., that "the government's regulation must advance the precise state interest which avowedly motivated the regulation." [Pet. (Opinion), pp. A15-A16] The court further held that respondent's temporary moratorium on construction for safety purposes clearly satisfied that refinement to the test. The court also pointed out that petitioner *did not allege any facts to show otherwise.* [Pet. (Opinion), p. A25] Indeed, petitioner *has not even asserted a bare argument* as to why the appellate court was wrong when it concluded that "[r]estricting the erection of structures in the flood zone along the river is calculated to substantially advance the state's legitimate interest in preventing injury and death during the next flood." [Pet. (Opinion), p. A25][16]

Lastly, petitioner argues that the decision below is contrary to *Nollan's* "holding that property owners have a right to build on their property, subject only to reasonable regulation of their conduct." [Pet., p. ii (Question 7), pp. 24-25.] Again, petitioner completely misinterprets *Nollan.* This Court expressly recognized that a building permit could properly have been denied in the case before it, *if* the condition imposed on its granting had a *proper nexus* with the legitimate state interest it purported to advance. There is absolutely nothing in *Nollan* which suggests that anyone has a constitutionally protected "right" to build on his property, if to do so would create a risk of harm to himself and others. If the rule were otherwise, all building and safety codes would be invalid. In short, the result reached by the Court of Appeal here is plainly dictated

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[16] Although petitioner contends that it should have had a trial on this issue, it has never offered a single clue as to what *facts* it could possibly assert to compel a different conclusion than that reached by the Court of Appeal.

by this Court's decision in *Keystone* and *Muggler*, and it is in no way inconsistent with *Nollan*.[17]

3. PETITIONER WRONGLY ARGUES THAT THE FLOOD PROTECTION PURPOSE OF RESPONDENT'S ORDINANCE IS IRRELEVANT.

Petitioner argues that the flood protection purpose of respondent's ordinance is irrelevant because "there is nothing about flood control which automatically immunizes flood control ordinances from constitutional examination." [Pet., p. 14] Petitioner cites "a recent case from Rhode Island" as being "instructive" on this point. [Pet., pp. 14-15] Here again, petitioner's analysis is faulty. The case cited, *Annicelli v. Town of South Kingstown* (RI 1983) 463 A.2d 133, is not in conflict with the Court of Appeal's decision here. It was decided before *Keystone*, but is not inconsistent with *Keystone's* rationale. Indeed, the Rhode Island court expressly said, "[w]e have ruled that use regulations that are reasonably necessary to protect the public health and safety are permissible exercises of the police power which do not require compensation (citations) provided that they do not become arbitrary, destructive, or confiscatory." 463 A.2d at 139.

Furthermore, the zoning ordinance actually before the court in *Annicelli* was not a true safety ordinance at all, despite petitioner's misleading description of the case. The Town had indeed attempted to justify the development restrictions which it placed on beach front property as being necessary for safety purposes – i.e., protection from coastal flooding. But the trial court had *rejected* the town's claim, and the Rhode Island Supreme

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[17] For the same reasons, the decision below is not in conflict with the New York Court of Appeals' decision in *Seawall Associates v. City of New York*, 74 NY 2d 92 (1989), as petitioner contends. [Pet., pp. 27, 28]

Court agreed with the trial court on that point. A reading of the case will show that the restrictions actually were intended to protect the *ecology* of the area, rather than to protect lives or property.

In contrast, the case of *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) is *truly* instructive on the subject of flood protection. There, Louisiana property owners were contending that local ordinances adopted in compliance with the National Flood Insurance Program resulted in an unconstitutional taking of their property.[18] After reviewing numerous decisions, both state and federal, including this Court's decisions in the instant case, *Nollan* and *Keystone*, the Fifth Circuit held that the NFIP, and local flood plain management ordinances which comply with the federal regulations, are not unconstitutional takings.

Hence, it is virtually a universally accepted proposition that denying a property owner the right to build in a

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[18] See, n. 6, *supra*. In *Adolph*, the Fifth Circuit described the NFIP as follows:

> "Under the NFIP, the federal goal is providing subsidized flood insurance for *existing* structures in flood-prone areas, while simultaneously discouraging *future* unsafe construction in such areas. (Citation) Minimizing future flooding hazards through sound flood-plain management is thus achieved through the enactment and enforcement of local ordinances. The policy has three basic purposes: (1) protection of individuals from danger, who would otherwise develop or occupy the flood-prone land; (2) *protection of other land owners from damage resulting from flood-zone development and consequent obstruction of the flood flow;* and (3) protection of the public from individual land-use decisions that later require public remedial expenditures for public works and disaster relief." (Emphasis added.) 854 F.2d at 734, n. 2.

natural flood way substantially advances the state's pre-eminent interest in preserving lives and property, and does not result in a taking under the Fifth Amendment. Any other ruling in this case would force respondent to either buy petitioner out of what *nature* has convincingly proved was a bad investment, or forego its own grave responsibility to protect the public. Neither the Constitution nor this Court's jurisprudence impose those Hobson's choices on respondent.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

DeWitt W. Clinton,
County Counsel
Charles J. Moore,
Principal Deputy County Counsel

Jack R. White*
Darlene F. Phillips
Dean E. Dennis
Hill, Farrer & Burrill

Attorneys for Respondent,
County of Los Angeles.

*Counsel of Record

No. 89-826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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a California corporation,
Petitioner,

vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITIONER'S REPLY BRIEF

JERROLD A. FADEM
MICHAEL M. BERGER*
RICHARD D. NORTON

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Petitioner
FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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JERROLD A. FADEM
MICHAEL M. BERGER*
RICHARD D. NORTON

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Petitioner
FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Constitution

Publications

No. 89-826

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Petitioner,
vs.
COUNTY OF LOS ANGELES, CALIFORNIA,
Respondent.

PETITIONER'S REPLY BRIEF

INTRODUCTION

When this case was decided by this Court in 1987 (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304) it was perceived by virtually all observers as a message to all parties involved in land use regulation (the regulators themselves, regulated property owners, neighboring property owners, and the courts which evaluate the validity of such schemes) that the scales of justice had been weighted too heavily in favor of the regulators and had failed to provide the protection to property owners guaranteed by the Fifth Amendment. (See commentaries cited in the Petition, pp 1-2.)

Two years after this Court's landmark decision remanded the case to the California court system to determine whether the *facts* of the case required application of the compensatory remedy mandated by the Just Compensation Clause, the California Court of Appeal decided that it could make that "ad hoc factual" determination[1] by itself — without a trial court evidentiary record — relying solely on the brief allegations in the complaint and selectively "judicially noticed" "findings" made by County administrative personnel on disputed factual issues, in non-adversarial proceedings, which had never been tested in the crucible of trial.

Because of the "high profile" of this Court's decision in this case, courts and regulators awaited the decision on remand to determine how the precepts established by this Court should be applied. In light of the California Court of Appeal's crabbed interpretation of this Court's opinion and its wilfull refusal to follow this Court's plain directions, other courts around the country are not applying this Court's landmark 1987 holding, reading the Court of Appeal's erroneous follow-up opinion as the definitive interpretation of this Court's decision. The Court of Appeal — following the lead of earlier California land use decisions before this Court's 1987 decisions — is evidently relying on the "odds" that this Court will deny review to insulate continuation of

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[1] This Court has repeatedly held that the determination of whether a regulation is a taking can only be made on an "ad hoc" case-by-case basis depending on the facts of the individual case. (*E.g.*, *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1004-1005.)

California's defiance of the clear command of the Fifth Amendment.[2]

If this Court meant to provide property owners the protection guaranteed by the Fifth Amendment when it decided this case in 1987, then the Court of Appeal's decision requires nullification — either by granting Certiorari in this case and clarifying the standards to be applied in adjudicating the Constitutionality of land use regulations, or by remanding the case to the California Court of Appeal forthwith, with instructions to reconsider its decision in light of this Court's prior decisions.[3] Without this Court's intervention, Fifth Amendment taking law will continue to be confused, resulting in a denial of the benefits of this Court's 1987 decision, with the Court of Appeal's opinion in this case aggravating the confusion and denigration of the rights of private owners.

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[2] A nationally recognized text describes the California judiciary's treatment of property owners as follows:

> "The striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property rights which would not be upheld in many other states, and (in some instances) probably not in any other." (1 Williams, *American Land Planning Law* [rev ed 1988] §6.03 at 184)

[3] While out of the normal pattern, circumstances sometimes require repeated decisions by this Court in order to do complete justice in a case. (*See, e.g., Golden State Transit Corp. v. City of Los Angeles* [1989] ___ US ___, 58 USLW 4033.)

THE COURT OF APPEAL'S FACTUAL DETERMINATION OF THIS CASE WITHOUT EVIDENCE, BASED ON "JUDICIAL NOTICE" OF COUNTY FACTUAL ASSERTIONS WHICH HAVE NEVER BEEN SUBJECTED TO TRIAL, DENIED FIRST CHURCH DUE PROCESS OF LAW

Neither the brief filed by the County nor the presentation by its amicus, California, deals with the reality of what the California Court of Appeal did to the Petitioner (First Church) when it disregarded the plain intent of this Court's 1987 remand that the *facts* be examined to determine whether a taking had occurred.

Indeed, both governmental briefs implicitly acknowledge that the Court of Appeal's second dismissal of this case was in derogation of this Court's remanding opinion and settled due process precepts laid down by this Court:

- The County repeatedly acknowledges that the Court of Appeal was making specific factual determinations, not merely examining pleadings, although the County *says* that the Court of Appeal was merely deciding the question whether the complaint stated sufficient facts to constitute a cause of action (County, p 3).[4]

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[4] "[The Court of Appeal] simply concluded that petitioner was not entitled to any compensation *because* respondent's Interim Flood Protection Ordinance *did not amount to a taking*." (County 19; emphasis, the County's.)

"... the Court of Appeal expressly found that

(continued)

- California's brief likewise makes clear that the Court of Appeal was engaged in "fact finding" without a factual record.[5]
- Both the County and California emphasize that the Court of Appeal took judicial notice of County ordinances (County 6, 15, 16, 17, 18; California 5, 7), recognizing no problem in so doing.[6] Both, however, *ignore* that

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(ftn. continued)

respondent's Interim Flood Protection Ordinance *did not deny all reasonable use of the property.*" (County 21; emphasis, the County's.)

"... respondent's ordinance did not deny petitioner *all* beneficial use of its campground property." (County 23; emphasis, the County's.)

"The appellate court concluded that the mere enactment of the ordinance did not amount to a regulatory taking, precisely because ... it did not deny appellant all economically viable use of its property." (County 24-25)

5 "The Court of Appeal specifically found, contrary to petitioner's contention, that the interim flood safety ordinance did not deprive First English of 'all use' of its property." (California 8)

"Here ..., the Court of Appeal found that the safety ordinance besides being insulated as part of the State's authority to enact safety regulations, did not deprive petitioner of all use of its property." (California 9)

6 First Church did not object to the Court of Appeal taking judicial notice of the content of the *ordinance* here at issue. The County and California are thus attacking a straw issue never raised by First Church. What First Church objects to is the Court of Appeal taking judicial notice of County documents purporting to "find" that its ordinance leaves First Church with "buildable areas" (App A, p 21), thus "proving" that the ordinance did not effect a taking.

> the due process issue raised here by First Church was because the Court of Appeal did not stop with examination of the *law*, but *also* took judicial notice of County Planning Commission assertions of *fact* and used those "facts" to conclusively "find" on appeal that First Church retained viable uses for its property.

The abuse of the judicial notice procedure to permit a party to *prove* its case at the appellate level is a denial of due process of law, as discussed in the Petition. (Pet 10-11, discussing *Ohio Bell Telephone Co. v. Pub. Util. Commn.* [1937] 301 US 292, *Garner v. Louisiana* [1961] 368 US 157, and *Turtle Mountain Band of Chippewa Indians v. U.S.* [Ct Cl 1974] 490 F 2d 935, 945.) Such judicial action was condemned by this Court in no uncertain terms as permitting the decision maker to "wander afield" and make decisions "without reference to any evidence, upon proofs drawn from the clouds." (*Ohio Bell*, 301 US at 307) Indeed, the brief filed by California recognizes this problem when it states that:

> "*Garner* and *Ohio Bell* merely stand for the self evident proposition that appellate courts may not judicially notice facts which are properly in dispute and the province of the trier of fact." (California 6)

But this case is here for a second time because the Court of Appeal failed to recognize that "self evident proposition" and proceeded to judicially notice "facts" which *are* in dispute and thus needing fact finding after trial.

Contrary to the assertions of both the County and California (County 16-17, California 5-6, 11), *Agins v.*

City of Tiburon (1980) 447 US 255 has nothing to do with this issue.

In *Agins*, all that the California Supreme Court judicially noticed was the ordinance there in issue. Comparing that ordinance, which permitted from 1 to 5 single family homes on the subject property, with the property owners' desires to build from 1 to 5 single family homes, it was easy to conclude that no facial taking had occurred.

This case is different, because the Court of Appeal went beyond the terms of the ordinance being reviewed and relied on *factual* assertions made in reports of the County Planning Commission to make *factual* determinations about the impact of the ordinance. (App A, p 21) That sort of "judicial notice" is what this Court outlawed in *Garner* and *Ohio Bell.*

Review by this Court is needed to ensure the primacy of the Due Process Clause in the review of land use regulations.

THE COUNTY'S POSITION IS BASED ENTIRELY ON *ASSUMED* FACTS WHICH HAVE NEVER BEEN EXAMINED BY ANY TRIER OF FACT

The County steadfastly refuses to deal with the legal issues actually presented by this Petition. *All* of the County's legal discussion is premised on the *assumption* of the existence of facts which have never been found by any court with fact finding jurisdiction because there has never been a trial.[7]

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[7] The Court of Appeal's assumptions are discussed at pp 4-5 herein and at Pet 8-9.

For example, the County asserts:

> "It is true that this Court has never held that *all* economically viable use of a parcel of property could be denied for reasons of public safety, but neither has the Court ever been faced with a case where all possible economically viable uses were dangerous." (County 22; italics, the County's; underscoring added.)

There is no evidence in this record that "all possible economically viable uses were dangerous." If the County wishes to so contend, the place to do that is at trial, not in the Court of Appeal solely by judicial notice.

The County further asserts:

> "Since petitioner was free to carry on any camping and recreational activities on its property which did not require the construction of buildings, the building restrictions imposed on its neighbors necessarily would protect and benefit petitioner . . ." (County 24; underscoring added.)

There is no evidence in this record from which to conclude that First Church would benefit in any way at all because of draconian restrictions placed by the County on First Church's neighbors. Nor is there any evidence from which to conclude that the "uses" remaining to First Church were viable without the use of permanent structures.[8]

The County additionally asserts:

> "There is absolutely nothing in *Nollan* [*v. California Coastal Commn.* (1987) 483 US 825] which suggests that anyone has a

[8] Is the County seriously contending that children should camp in a flood hazard area protected only by tents?

> constitutionally protected 'right' to build on his property, if to do so would create a risk of harm to himself and others. If the rule were otherwise, all building and safety codes would be invalid." (County 27; underscoring added.)

There is no evidence in this record from which to conclude that *any* construction of buildings by First Church would create risks of harm to anyone. If the case were tried, engineers could present *evidence* as to appropriate building techniques which could provide some use to First Church without danger to life or property. But the County's strategy and the Court of Appeal's decision solely on County factual assertions without trial precluded any development of evidence of proper building techniques.

Nor is there anything to the County's hyperbolic claim that any view contrary to its own would require the invalidation of all building and safety codes. First Church has never advocated such an extreme position. What this Court said in *Nollan v. California Coastal Commn.* (1987) 483 US 825 was that property owners have a right to build subject only to reasonable regulation. That is all that First Church suggests at bench. (Pet 24)

The County's position — adopted and enforced by the Court of Appeal — requires this Court to accept speculation in place of evidence.

CONCLUSION

The County's brief does this Court a disservice. It fails to deal with the deprivation of due process created by the Court of Appeal's extensive factual assumptions without evidence. It fails to deal with the Court of

Appeal's disregard of this Court's 1987 remanding opinion. And it fails to deal with the adverse national impact of the Court of Appeal's evisceration of this Court's 1987 opinion.

By itself, the Court of Appeal's treatment of First Church furnishes sufficient grounds for this Court to summarily reverse and remand the case for proper treatment.

But the harm done to the law of land use on a national scale if the Court of Appeal's opinion is allowed to stand will be immeasurable. Lower courts seeking to apply this Court's *First English* opinion will seek guidance as to its meaning and application from the opinion of the California Court of Appeal on remand. That opinion is already being heavily cited by governmental regulators as the definitive interpretation of this Court's holding.

This Court's action is needed to preserve the protection guaranteed by the Fifth Amendment's Just Compensation Clause. First Church prays that Certiorari be granted.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
RICHARD D. NORTON
of FADEM, BERGER & NORTON

By: MICHAEL M. BERGER
Counsel of Record

Attorneys for Petitioner

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BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF THE PETITION FOR CERTIORARI

RONALD A. ZUMBRUN
EDWARD J. CONNOR, JR.
*TIMOTHY A. BITTLE
*Counsel of Record
PACIFIC LEGAL FOUNDATION
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES – Continued

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation submits this amicus curiae brief in support of

petitioner's petition for writ of certiorari. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit foundation, incorporated under the laws of California for the purpose of participating in litigation that affects the public interest. An independent Board of Trustees composed of concerned citizens, a majority of whom are attorneys, authorizes participation in a case only when it concludes that PLF's position has broad public support. The Board of Trustees has authorized PLF's involvement in this case.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW

In its 1987 decision, this Court ruled that monetary compensation is mandated by the Constitution when regulation takes private property, even if the taking is only temporary. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

Due to the absence of a factual record (the case having come up on a dismissal of pleadings) the Court left undecided the question of whether First English Church's property was in fact taken by the Los Angeles County flood control ordinance. For the same reason the Court noted it had no occasion to decide whether the county might avoid a taking conclusion by establishing that a denial of all use is insulated under the Fifth Amendment as a part of the state's authority to enact safety regulations. *First English*, 482 U.S. at 313.

The latter question involves not only issues of fact, but also an extremely important question of law, namely: Can government deny *all* use of an owner's property, if done to protect public safety, without compensating the owner? Because a factual record has not yet been developed in the case, this Court properly refrained from offering an advisory opinion on the issue. The California Court of Appeal on remand, however, did not feel so restrained and, despite the same lack of a factual record, took it upon itself to answer this weighty question. The Court of Appeal has announced that government can indeed, consistent with the Fifth Amendment, deprive an owner of all use of his property to promote public safety, and the owner must bear that loss uncompensated.

As an "independent" ground for its decision, the Court of Appeal also ruled that the temporary denial of use imposed by the county was lawful because it was not unreasonably long, "even were we to assume its restrictions were too broad if *permanently imposed*." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1372 (1989) (emphasis in original). In so ruling, the Court of Appeal adopts the view of the *dissent* in this Court's 1987 decision.

The *First English* case is one of high visibility, and the Court of Appeal's opinion will be widely read by government officials and attorneys who must advise clients in this area of the law. In regulation-happy California, the uncertainty brought about by this decision can lead to further eroding of constitutionally protected property rights and to protracted litigation and legal costs associated therewith. The issues are too important to be

decided without the guidance of this Court, and this Court is therefore respectfully urged to grant the petition.

SUMMARY OF ARGUMENT

1. The California Court of Appeal erred by ruling that no taking had occurred when it had no evidentiary record upon which to conduct the constitutionally mandated "ad hoc, factual inquiry" courts must undertake in takings cases.

2. The Court of Appeal in deciding the major issue of whether a denial of all use, done to promote public health and safety, nonetheless requires compensation—an issue this Court left for another day—decided the issue in conflict with this Court's precedents.

3. The Court of Appeal rejected this Court's ruling that a denial of use, which would constitute a taking were it permanent, is no less a taking just because it is temporary.

ARGUMENT

I

TAKING CLAIMS CANNOT BE DECIDED WITHOUT A FACTUAL RECORD

The Court of Appeal took it upon itself to determine whether First English Church had suffered a taking without ever giving the church an opportunity to conduct discovery or put on evidence. That was a significant legal error. This Court has consistently described the review which courts

must undertake in takings cases as an "ad hoc, factual inquiry." *See, e.g., Pennell v. City of San Jose*, 485 U.S. ___, 99 L. Ed. 2d 1, 13 (1988); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 294-95 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

It is of course stating the obvious to say that a factual record is not developed in the Court of Appeal. It is developed in the trial court, where there is an opportunity to conduct discovery, subpoena records, examine witnesses, introduce evidence, object to evidence, put on experts—in short, a chance for each side to prove its case.

The importance of a thorough factual record was discussed by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt*, this Court upheld the New York ordinance at issue, but only after the property owner had been given opportunity to and failed to develop an evidentiary record showing that the ordinance was not reasonably necessary for public safety. The Court said:

> " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'
>
> . . . .
>
> "The ordinance in question was passed as a safety measure, and the town is attempting to

> uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." *Goldblatt*, 369 U.S. at 594-95.

The quoted language obviously demonstrates that, had there been facts in the trial court record to show that no viable use remained for the property, or that the ordinance was overbroad, or that less restrictive alternatives were available, the Court might well have reached a different result. As stated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 127:

> "It is, of course, implicit in Goldblatt that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."

Issues of reasonableness and impact on use are issues of fact. The lack of an evidentiary record at the present pleading stage of this case caused this Court to conclude that it could not determine whether a taking had in fact occurred. *First English*, 482 U.S. at 313. The California Court of Appeal was no better equipped to make that determination. As stated in *Goldblatt*, the court would need to know such things as the nature of the menace against which the Los Angeles County ordinance was supposed to protect, and the availability of other less drastic protective steps. The court simply had no evidence on matters such as the probability of another similar flood, whether the upstream watershed could be

revegetated, whether perhaps it had already become revegetated, whether the church's full 21 acres were subject to flooding, whether the church's land could be graded so as to elevate some of the acreage above the flood plain, and whether buildings could be designed to withstand flooding.

The Court of Appeal also had no evidence to explain why, if the county was concerned about loss of life on the church's property, it prohibited buildings, but not people. In the Court of Appeal's own words, the ordinance "does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished . . . and the construction of new structures. . . . [M]any camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched." *First English*, 210 Cal. App. 3d at 1367.

In addition, the Court of Appeal had no evidence to explain why, if the county was concerned about debris that could be carried away in a flood, it prohibited even flood-engineered buildings, but would permit a parking lot full of unanchored cars on the flood plain. *See First English*, 210 Cal. App. 3d at 1370.

If given the chance, First English Church might be able to show that the county had simply seized upon the flood as a chance to further its growth control and environmental preservation goals for the Santa Monica Mountains.

In the absence of any evidence against which to weigh the reasonableness of the county's ordinance, this Court properly refrained from venturing an opinion

about whether the church's property had been taken. This Court returned the case to the state courts so that the church could have its day in court. The Court of Appeal should have sent the case on to the trial court. Unfortunately, when the spotlight of public attention was turned on the Court of Appeal, that court could not resist the temptation to make legal history by deciding those questions which this Court found itself unable yet to answer. The result of the Court of Appeal's action was to again deprive First English Church of its day in court. More importantly, in the absence of a factual record, the Court of Appeal erred in deciding the ultimate legal issue, that is, whether a denial of all use is lawful without compensation if done in the name of public health and safety.

II

A COMPLETE DENIAL OF ALL USE REQUIRES JUST COMPENSATION

The Court of Appeal seriously mischaracterized prior pronouncements of this Court when it concluded that "where health and safety are at stake," all use of private property can be denied without compensation. *First English*, 210 Cal. App. 3d at 1366. Although the court purports to rest its conclusions on Supreme Court precedents, including the majority opinion in *First English*, this Court has never so held and the precedents relied upon do not support this view.

The Court of Appeal completely misread this Court's *First English* opinion. The Court of Appeal asserts: "[T]he

Supreme Court majority clearly stated the land use regulation involved in this case . . . would *not* constitute a compensable 'taking' . . . even assuming it prohibited 'all uses' of that property if the deprivation . . . promoted public safety." 210 Cal. App. 3d at 1366 (emphasis in original). Far from "clearly stat[ing]" this view, the Supreme Court majority actually said it had "no occasion to decide" the issue. *First English*, 482 U.S. at 313.

This Court's opinion reflects that the county was proposing this view. However, the Court clearly indicated that consideration of the county's argument would not be appropriate in the absence of a factual setting making it necessary to do so. To quote the Court, "[w]e accordingly have no occasion to decide . . . whether the county *might avoid* the conclusion that a compensable taking had occurred *by establishing* that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 482 U.S. at 313 (emphasis added).

Amicus is not aware of any decision of this Court holding that all use can be denied in the name of public health and safety without running afoul of the guaranty of compensation. To say that a regulation promotes health or safety is merely to say that the regulation advances a legitimate state interest. This Court has always held, however, that finding a legitimate state interest does not end the taking inquiry. "It is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Besides *First English*, the only other case the Court of Appeal looks to as support for its theory is *Mugler v. Kansas*, 123 U.S. 623 (1887). *Mugler*, a nuisance case, like all this Court's nuisance cases, does not involve facts where all use of private property was denied. The defendant, Mugler, while prevented from using his property as a brewery, was free to put it to any of a host of other lawful uses. Moreover, *Mugler* was the first of a long line of cases to hold that a compensable taking occurs when either the government's action does not substantially advance a legitimate purpose *or* the owner is denied all reasonable use of his property:

> "It does not at all follow that every statute enacted ostensibly for the promotion of [public health and safety] ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or* is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler*, 123 U.S. at 661 (emphasis added).

This rule has been oft repeated. In *Pennsylvania Coal Co. v. Mahon*, the Court indicated that a denial of all reasonable use, by itself, would constitute a taking when it wrote: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). In *Agins v. City of Tiburon*, the Court stated that a taking occurs "if the ordinance does not substantially advance legitimate state interests . . . *or*

denies an owner economically viable use of his land." 447 U.S. 255, 260 (1980) (emphasis added). In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court wrote: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" 452 U.S. at 295-96. In *Kirby Forest Industries, Inc. v. United States*, the same language is used again: "Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner [of] economically viable use of his land.'" *Kirby* refers to this rule as one this Court has "frequently recognized." 467 U.S. 1, 14 (1984). In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court assumes that compensation would be owing if, after a final decision by the municipality, "the jury would have found that the respondent had been denied all reasonable beneficial use of the property." 473 U.S. 172, 191 (1985). Recently, in *Nollan v. California Coastal Commission*, this Court affirmed the rule with these words: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' *and* does not 'den[y] an owner economically viable use of his land.'" 483 U.S. 825, 834 (1987) (emphasis added). Perhaps most significant for purposes of the present case is the use of this "either/or" analysis by the Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). There the Court found that the Pennsylvania subsidence statute substantially advanced the same state interest at stake in *First English*, namely the preservation of human life. Nonetheless, it went on to consider whether the statute deprived the coal companies of the

economically viable use of their land. *Keystone*, 480 U.S. at 493.

It is readily seen from the above list that this Court has repeatedly held, contrary to the announcement of the California Court of Appeal, that even when regulation is justified by concerns for public health and safety, the owner must either be left with some economically viable use, or be paid compensation. Astonishingly, the Court of Appeal refers to this rule as just the opinion of "[o]ne pair of commentators." *First English*, 210 Cal. App. 3d at 1365.

The Court of Appeal misinterpreted a full century of this Court's jurisprudence when it ruled that all use can be denied for public health or safety reasons without compensation. The court did not stop there, however. As an alternative ground for its decision, it went on to reject this Court's holding, in this very case, that a temporary taking is no less compensable than a permanent one.

III

TEMPORARY TAKINGS ARE COMPENSABLE

In its 1987 decision this Court held that temporary deprivations of use "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318. The Court of Appeal, however, holds that "the interim ordinance did not constitute a 'temporary unconstitutional taking' even were we to assume its restrictions were too broad if *permanently imposed*." *First English*, 210 Cal. App. 3d at 1372 (emphasis in original).

This Court held that temporary delays on the ability to use property are excusable if "normal," and cited as examples the time needed to process requests by the owner such as building permit applications and zoning change requests. *First English*, 482 U.S. at 321. The Court of Appeal, however, excuses delays that are years long, and—far from accommodating some request by the owner—are intended to tie the owner's hands while the government ponders how much it will pare his property rights back, so long as these delays do not strike the court as "unreasonable."

This Court's contrast of the denial of use suffered by First English Church on the one hand, and normal delays to process land use applications on the other hand, reveals this Court's thinking that the purpose for a delay, not just its length, determines whether it constitutes a taking. If a denial of use is for a confiscatory purpose, then it is a taking without regard to its length.[1] Thus the court must look at the governmental purpose involved. An ordinance passed to prohibit all use is different from the delay of a particular proposed use. If the public objective is to keep the land unused, rather than to regulate its use, that is a confiscatory purpose and should be regarded as a taking even if the length of time involved might be regarded as normal or reasonable in another context.

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[1] Even if the delay is for a nonconfiscatory purpose, it may still cause a taking if left in effect an abnormally long time. But one does not get to this step if the public purpose is confiscatory.

The Court of Appeal rejected this idea and ruled that, regardless of the confiscatory or nonconfiscatory nature of the county's ordinance, if it was passed for health and safety reasons, and was not "unreasonably" long, it could not be a taking. The Court of Appeal is mistaken, if not defiant, and should be overruled.

CONCLUSION

Since the California Court of Appeal has committed major errors interpreting the rights guaranteed to the petitioner by the federal Constitution, which will affect property owners throughout the state if not reversed, this Court is urged to grant the petition for certiorari.

DATED: December, 1989.

Respectfully submitted,

RONALD A. ZUMBRUN
EDWARD J. CONNOR, JR.
*TIMOTHY A. BITTLE
*Counsel of Record
PACIFIC LEGAL FOUNDATION
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

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FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, A CALIFORNIA CORPORATION,
Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, CA 90067
(213) 284-2231

**Counsel of Record*

WILLIAM H. ETHIER
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

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No. 89-826

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Home Builders has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and has filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders represents almost 160,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Over 7,000 of those members are in California. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial

builders, as well as land developers and remodelors. It is the voice of the American shelter industry.

Together, the industry the National Association of Home Builders represents has built over 1,400,000 housing units in 1989, over 245,000 of which were built in California. In fact, California leads all other states by far in the number of units built, having produced over 17% of the housing units in the entire country.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the National Association of Home Builders. The actual availability of compensation for the occasional ordinance that results in a taking is critical to the livelihood of private landowners who have lost the beneficial use of their property solely in order to serve local governmental interests, such as in the present case by effectively converting private property into a public flood control channel.[1]

The courts of California, unlike those of virtually every other state and federal jurisdiction that has considered the question, have held, either directly or through procedural mechanisms, that private landowners are not entitled to the just compensation required by the Fifth Amendment (and made applicable to the states by the Fourteenth Amendment) where a local governmental body adopts a land use regulation that takes the landowners' property by depriving it of all, or substantially

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[1] Depending on how the calculation is made, there are somewhere between 162 million and 195 million acres of flood land throughout the United States, approximately 7 million acres of which are located in California. *See A Status Report on the Nation's Floodplain Management Activity (An Interim Report)*, prepared by the Interagency Task Force on Floodplain Management (April, 1989).

all, use. The California courts have taken this position notwithstanding this Court's holding to the contrary in its previous decision in this case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The National Association of Home Builders was before this Court as an *amicus curiae* on behalf of the petitioner when this case was first brought before this Court. We submit this brief to this Court to resolve the question of whether a court may do indirectly what it may not do directly; that is, whether it may deny a landowner the payment of just compensation by denying the landowner the opportunity to prove that its property has been taken.

SUMMARY OF THE ARGUMENT

The courts of California have a long history, both before and after this Court's initial decision in this case, of limiting the rights of property ownership, requiring landowners to pay more than their fair share of the burdens imposed on all citizens, and denying them just compensation in those situations where a taking has occurred. The latest method of doing this—the one presently before this Court—is to use the stratagem of deciding questions of fact as though they were questions of law and granting judgment in favor of the government without providing the landowner with a trial on the merits.

ARGUMENT

It has long been the position of the courts of California that landowners can be required to provide their property to the public as a *quid pro quo* for the right to obtain governmental permits which would allow de-

velopment of that property. *Ayres v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949) (dedication of land to widen a major thoroughfare adjoining the property to be developed). The underlying philosophy was best stated in *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981), which upheld the requirement that fees be paid for interim school facilities:

> "The dedication of land or the payment of fees as a condition precedent is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. Development is a privilege not a right."

Trent Meredith does not stand alone; similar expressions are common in reported decision. *See, e.g., Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496, 1506, 246 Cal.Rptr. 21, 25 (1987):

> "Developers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel."

This view—that development is a privilege—is directly contrary to this Court's holding that development is a right and not a privilege.

> "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

The philosophy stated by the foregoing California opinions was accompanied by a determination by the California Supreme Court that just compensation could never be required as a result of a regulatory taking. *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 589 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Before *Agins* was decided by the California Supreme Court, the California Courts of Appeal routinely reversed trial court judgments awarding just compensation for inverse condemnation. See, *e.g.*, *Briggs v. State of California ex rel Department of Parks and Recreation*, 98 Cal.3d 190, 159 Cal.Rptr. 390 (1975), *app. dismissed and cert. denied*, 447 U.S. 917 (1980); *Rancho LaCosta v. County of San Diego*, 111 Cal.App.3d 54, 168 Cal.Rptr. 491 (1980), *cert. denied*, 451 U.S. 939 (1981); and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

Agins, at least in theory, held out the hope that some remedy—even if only invalidation—of a regulation which went too far was available. As a practical matter, no such remedy existed. The remedy was often precluded by procedural decisions. In fact, three of the four California taking cases which came before this Court in the 1980's arose in the context of a demurrer or motion to strike; that is, without any trial on the merits. *Agins v. City of Tiburon, supra; MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); and the original opinion in the case at bar.[2]

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[2] The dissent in *Agins* in the California Supreme Court took the majority to task for ruling as it did on a demurrer where sufficient facts had been pleaded to state a cause of action.

> "... unless, of course, the majority deemed that they are not bound by the honored rule of law which pre-

The attitude of the courts of California is also demonstrated by their refusal to honor this Court's holding in *Nollan, supra*, which prohibited the "extortion"[3] of easements by the California Coastal Commission. They did this, not by defiantly saying that such easements could be required, but rather by making it impossible for landowners who had been forced to make illegal dedications to recover what they had lost.

Thus, in *California Coastal Commission v. Superior Court*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (1989), and *Rossco Holdings, Inc. v. State of California*, 212 Cal.App.3d 642, 262 Cal.Rptr. 736 (1989), the Courts of Appeal held that a failure to seek administrative review of a permit containing a condition requiring the dedication of an easement barred the landowner from recovering just compensation for the property taken. Compare these mean spirited procedural determinations with that made by the Supreme Court of Florida which has separated litigation involving the judicial review of improper administrative land use decisions from that involving the issue of a taking. See the discussion in *Lake Lucerne Civic Association, Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370-1371 (11th Cir. 1989), which sets forth the Florida courts' procedures for first testing the validity of an administrative land use decision and then allowing a second lawsuit for a taking if necessary.

Finally, compare the positions taken by the courts of California in *Nash v. City of Santa Monica*, 37 Cal.3d

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vents the court on a demurrer from finding factual issues contrary to matters well pleaded in the complaint." *Agins, supra*, 24 Cal.3d 266, 280, 117 Cal.Rptr. 372, 380, 598 P.2d 25, 33 [footnote omitted].

[3] *Nollan, supra*, 483 U.S. at 837.

97, 207 Cal.Rptr. 285, 688 P.2d 894 (1984), *app. dismissed*, 470 U.S. 1046 (1985), and *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892, 223 Cal.Rptr. 379 (1986), which held that the owner of residential property had no right to go out of the residential rental business (*Nash*) unless the landowner was willing to provide replacement housing or pay an in lieu fee, with *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. ___ (Nov. 27, 1989), and *San Telmo Associates v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 673 (1987), both of which held precisely to the contrary.

> "The striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property rights which would not be upheld in many other states, and (in some instances) probably not in any other. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; the same spirit pervades the body of California zoning law generally . . . [T]he general rule [is] that practically anything goes . . . " 1 Williams, *American Land Planning Law*, section 6.03 at 184-185 (1988 Rev.) [footnote citing six California Supreme Court cases omitted].

This Court's help is needed if landowners in California are to enjoy the Constitutional protection identified by this Court and routinely provided by the federal courts and the courts of the other states.

CONCLUSION

Unfortunately, it is sometimes necessary for superior courts to reinstruct the lower courts that they are required to follow the clear mandate of the Constitution. "Judicial officers," like other state officers, are required to follow this Court's interpretation of the Constitution; it is, after all, the supreme law of the land. *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). See also, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982); 746 F.2d 1437 (11th Cir. 1984); and 883 F.2d 267 (11th Cir. 1987), *reh'g. denied*, 844 F.2d 794 (11th Cir. 1988), where the Court of Appeals was required, three times, to reverse a trial court's determination that unreasonable land use regulation was not to be adequately compensated in damages.

In the case at bar, the only way that the courts of California can be brought into line with this Court's clear statement that the Just Compensation Clause requires the payment of just compensation when the facts warrant them is to grant the petition for certiorari and review the limits which a court may place on a landowner's attempt to recover just compensation when a taking has been alleged.

Respectfully submitted,

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, CA 90067
(213) 284-2231

**Counsel of Record*

WILLIAM H. ETHIER
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

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BRIEF OF AMICUS CURIAE OF THE CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

WILLIAM M. PFEIFFER,
Vice President and General Counsel*

JUDITH K. HERZBERG, Senior Counsel
CALIFORNIA ASSOCIATION OF REALTORS®

525 South Virgil Avenue
Los Angeles, California 90020
(213) 739-8200

Attorneys for Amicus Curiae

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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WILLIAM M. PFEIFFER,
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JUDITH K. HERZBERG, Senior Counsel
CALIFORNIA ASSOCIATION OF REALTORS®

525 South Virgil Avenue
Los Angeles, California 90020
(213) 739-8200

Attorneys for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions:

Other Authorities:

No. _____

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Association of REALTORS® respectfully submits this brief amicus curiae in support of Petitioner, First English Evangelical Lutheran Church of Glendale.

Amicus curiae California Association of REALTORS® (C.A.R.) is a voluntary trade association whose members consist of Boards of REALTORS® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has 180 affiliated Boards of REALTORS® and over 135,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of private property rights.

The California appellate courts need guidance from this Court in determining when a regulatory taking so undermines private property rights that compensation under the U.S. Constitution is required. The California rule, if this case is allowed to stand, will allow municipalities to impose land use regulations that effectively deprive a private property landowner of all reasonable use of his property without any viable remedy.

With the extensive proliferation of land use regulatory programs that greatly restrict the use to which private property may be put, C.A.R., its members and all the property owners they represent have a significant interest in the outcome of this case and the law it establishes.

SUMMARY OF THE ARGUMENT

In 1986, when this case was briefed on the remedy issue, we noted that this Court was not presented with the broad question of establishing constitutional standards for determining whether a land use regulation constitutes a de facto taking of private property. With this second phase of the case, it is.

The California appellate court, in applying the guidelines set forth by this Court, has ruled that a regulatory taking only occurs if all reasonable use of property is denied. Further, in its opinion is an analysis

that would effectively result in no regulatory taking if property is taken for public safety. This Court has declared over the years that there is no set formula for defining when a regulatory taking occurs. The California appellate court's decision in this case would make it extremely difficult, if not impossible, to find a regulatory taking and will result in a great injustice to property owners specifically and society as a whole.

Counsel for C.A.R. are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus brief will be helpful to this Court.

ARGUMENT

I. WHEN REGULATORY IMPOSITIONS HAVE THE SAME EFFECT AS PHYSICAL INVASIONS, COMPENSATION MUST BE PAID.

In September, 1789, Congress adopted the Bill of Rights, which was sent to the states for ratification. Of the twelve amendments sent, ten were ratified including what today is the Fifth Amendment. It is only fitting and proper that as we begin our national celebration of the two hundredth year of the Bill of Rights, this Court continue in its well reasoned efforts to assist the citizens of this country in determining what those rights are that are so zealously guarded.

It is axiomatic that the Bill of Rights generally, and the Just Compensation Clause of the Fifth Amendment specifically, was adopted to protect individuals from

majoritarian oppression.[1] As is always the case, it is this Court's duty to apply the principles encompassed in the Constitution to facts as they exist today, two hundred years later. In 1789, the framers did not conceive of the highly sophisticated bureaucratic land use regulatory system that exists today. In 1789, land was actually "taken" for public use.[2] Today, faced with ever diminishing tax revenues, governmental entities find it more economically "acceptable" to turn to land use regulation than eminent domain to accomplish the same goal. Why buy a park when it can be had by merely zoning land "open space?"

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[1]*See generally* L. Tribe, *American Constitutional Law* 587 et seq. (2nd Ed. 1988). The Fifth Amendment deals "with the idea that government must respect 'vested rights' in property and contract--that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation."

[2]*See, e.g.*, the case *Reichert v. Felps*, 73 U.S. (6 Wall.) 160 (1868), in which the U.S. Government under the authority of the Judiciary Act of 1789 invalidated patents by the Governor of the Northwest Territories in favor of later issued U.S. patents. The Supreme Court had to reverse the lower courts' decisions and restore the property to Felps.

The evolution of "regulatory taking" law has been, by this Court's own admission,[3] less than clear and concrete as one might expect, given the case-by-case analysis that is required. Currently, the most clearly stated judicial guide for determining whether a regulation constitutes a taking is that there is no "set formula." In case after case, the judiciary has avoided pronouncing distinct, concrete guidelines for such a determination.[4] Instead, this Court has pronounced that "there is no set formula to determine when a taking occurs," and has repeatedly noted that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978).

Admittedly, it would be difficult, if even possible, to develop a set formula for every case to determine when a regulation becomes a taking. However, the Court in this case has the opportunity to clarify guiding principles mentioned, but not fully explained, in regulatory takings cases for sixty-eight years. In all the cases since the 1922

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[3]*See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *San Diego Gas & Elec. Co. v. San Diego* 450 U.S. 621 (1981); *Agins v. City of Tiburon* 447 U.S. 255 (1980); *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)

[4]See footnote 3.

Pennsylvania Coal case, perhaps none has set forth a regulatory takings doctrine with any more clarity than Justice Holmes' statement that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Petitioner brings this case before this esteemed Court because the courts in California need further guidance in interpreting the Fifth Amendment of the U.S. Constitution. Planners and property owners alike as well as their respective counsel have reviewed the cases from the 1987 term[5] and many of the law reviews[6] in light of

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[5]*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470 (1987)

[6]Salsich Jr., *Keystone Bituminous Coal, First English and Nollan: A Framework for Accommodation?* 34 J. of Urb. and Contemp. L. 173 (1988); Symposium: *Land-Use, Zoning and Linkage Requirements Affecting Pace of Urban Growth*, 20 Urban Lawyer 413; Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 The Urban Lawyer 113 (1989); Symposium: *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335 (1988); *see also* footnote 15 and cases cited therein.

previous cases dealing with regulatory takings[7] and still they are in a quandary.

This Court has consistently reiterated the rule set forth in *Pennsylvania Coal* that a regulation that goes "too far" can be a taking, but the definition of "too far" remains unclear.

In evaluating the character of an alleged regulatory "taking" action, this Court has observed that it is necessary to apply the multifactor balancing test which has appeared in taking cases since *Penn Central* and includes "such factors as the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations." *PruneYard* at 83.

However, when this Court analyzes a physical "taking" (whether it results from a regulation or not) the standard is much more relaxed:

> When "the character of the governmental action" (cite omitted) is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Loretto at 434-435.

Unlike the physical takings analysis, regulatory takings analysis involves a balancing of factors to determine what is "too far" as was noted by Chief Justice Rehnquist in his dissent in *Keystone*.

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[7]*See* footnote 3.

> ...we have recognized that regulations--unlike physical invasions--do not typically extinguish the "full bundle" of rights in a particular piece of property....This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the "several factors" enumerated in *Penn Central Transportation Co....*

Keystone dissent at 516.

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), although unable to decide on the merits of the case because of procedural deficiencies, this Court made a statement that could be construed to clarify the concept of "too far" as "that point at which a regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199. *See also Pennsylvania Coal* at 413.

The guidance of this Court is needed to assist all interested parties in better understanding when a regulation goes "too far," and to avoid the inequities that occur from a rule that seems to allow compensation for a minor physical invasion but not for a regulatory imposition that leaves only the barest of rights.

If the County of Los Angeles had determined that the most effective method of handling the water runoff was to put in a flood control channel through Petitioner's property, the appellate court seemingly, by applying the guidelines of the Court vis-a-vis physical takings, would

have little difficulty in finding a taking of private land for public use requiring just compensation.

The County of Los Angeles, however, has accomplished the same thing by prohibiting reasonable use of the property, thereby creating a natural runoff.

Why should the standard of analysis be different for the two approaches available to the County? This Court has found a taking when a cable is stretched across the roof of a building pursuant to an ordinance[8] but not when 27 million tons of coal are prohibited by ordinance from being mined.[9] Given these two extremes, what governmental entity would choose the *Loretto* approach when the *Keystone* approach is available?

The Petitioner, in fact, is damaged far greater by the County's choice. If it had chosen to put in a channel (designed, of course, to blend with the natural setting), Petitioner would then presumably be entitled to use the rest of its property for its intended purpose with access restricted only to the runoff channel itself; not an uncommon situation. The diminution in value, although present, would be less and would be compensable.

The Petitioner's property under the County's choice is rendered virtually valueless. Who would want to own or pay money for land that is useful only for cooking meals (without a kitchen, of course), playing games, giving lessons (outdoors, of course: query, what if it rains?) and pitching tents (the ordinance states that one

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[8]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

[9]*Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470 (1987)

can not place a structure in the flood protection area so even pitching tents is suspect)? These minimal uses and lack of economic value, based on the County's decision to declare the property a "flood protection area," and the method it chose to accomplish that, must be a regulatory taking pursuant to the Fifth Amendment.

II. THE PUBLIC AT LARGE, RATHER THAN THE INDIVIDUAL PROPERTY OWNER, SHOULD BEAR THE COST OF PUBLIC IMPROVEMENTS WHEN THE BURDEN ON THE INDIVIDUAL IS MORE AND DIFFERENT THAN THAT ON THE PUBLIC.

In determining when there is a "taking," both courts and commentators agree that an individual property owner should not be forced alone to bear the burdens of providing a public benefit. This Court has consistently recognized that one of the principal purposes of the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[10]

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[10]*Nollan v. California Coastal Comm'n*, 438 U.S. 825, 835, n.4 (1986); *San Diego Gas & Elec. Co. v. San Diego* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

In *Agins v. City of Tiburon* 447 U.S. 255 (1980), the Court restated the principle of shifting burdens based on fairness:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. *Id.* at 260.

An analysis of the *Agins* case demonstrates that important factors included not only the legitimate state interest,[11] but also the degree of reasonable investment backed expectations (Agins was planning to develop raw land for residential purposes); the reciprocity of advantage (similarly situated properties were likewise affected); the prevention of beneficial use of the property; and the degree to which a fundamental attribute of ownership is extinguished (Agins could still use the land for less dense residential purposes).

In contrast, application of the rule to this case shows that despite the fact there is indeed a legitimate governmental interest, the Church has more than a mere expectation of use, it has decades of vested use. There is no land or profit speculation involved. Because of its location, Petitioner's property is more affected than others by the moratorium. Not only has best use, but

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[11]But see *Nollan* in which this Court stated that "our cases describe the condition for abridgement of property rights through the police power as a substantial advanc[ing] of a legitimate state interest. *Nollan* at 841.

practically all use (an essential ownership attribute) has been denied.

The government's goal of preventing harm to property and life in the instant case is laudable. Surely, it is within the government's police power to attain such an end, however, as was noted by one commentator, "since some losses can be imposed constitutionally, the problem for takings jurisprudence is to decide when an individual has borne more than his or her 'just share of the burdens of government.'"[12]

Chief Justice Rehnquist, in his dissent in *Keystone*, perhaps most succinctly stated the goal of the Fifth Amendment.

> Though...the Fifth Amendment does not prevent actions that secure a 'reciprocity of advantage,' ...it is designed to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (citing *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

In determining the burden on the Church it is helpful to explore the cost to the Church to meet the purpose it

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[12]Rose-Ackerman, *Against Ad Hocery: A Commentary on Michelman*, 88 Colum. L. Rev. 1697, 1708 (1988)

set out to accomplish decades ago, and in fact did accomplish until the moratorium.

In operation was a convention center, a retreat for its parishioners. A place for handicapped children to get away from the city. A place of reflection. To serve all parishioners of varying age and agility, buildings are required, including a chapel for worship.

To accomplish this purpose, the Church must now purchase other land in the mountains, but not in a similarly protected zone owned by the government (much of the land in the mountains above Los Angeles is owned by the Federal government). The available land is perhaps beyond the financial reach of the Church because of the economics of supply and demand. While encumbered with land that is for all practical purposes unusable, but still requires an ongoing debt service, the Church must find property to accomplish its purpose. This financial burden on the Church is disproportionately heavy compared to the burden on the public at large in Los Angeles County which frequently adds flood control facilities to its sprawling flood control infrastructure. For decades, the populous of Los Angeles County has been served by a flood control system that has, with great success, protected life and property from major destruction. Compensating the church and passing this cost on to the 8,650,300 people of Los Angeles County[13] is the only fair and just thing to do.

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[13]Dept. of Finance, State of California, *Population Estimates of California Cities and Counties January 1, 1988 to January, 1, 1989* (May, 1989)

> In the words of Justice Holmes:
> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal at 416.

III. THERE IS A NEED FOR THIS COURT TO MORE ADEQUATELY DEFINE "ECONOMICALLY VIABLE USE" WHICH MUST INCLUDE REASONABLE INVESTMENT-BACKED EXPECTATIONS

Of particular importance in this case because of their use in previous cases are the terms "economically viable use"[14] and "reasonable investment-backed expectations."[15]

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[14]*Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 174, n.8 (1979); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172 (1985).

[15]*Penn Central*, 438 U.S. 104; *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna*, 444 U.S. 164; *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Williamson County*, 473 U.S. 172; *Keystone*, 480

Unfortunately, case law creates an ambiguous picture of what these concepts actually mean in today's regulatory takings arena.

This Court has discussed the economic harm of a governmental action in many ways since 1922, for example.

> a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'.

Penn Central at 127.

> (a)ny intelligible takings inquiry must also ask whether the extent of the state's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.

Loretto at 453.

> We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests,'.... or denies an owner economically viable use of his land...

Keystone at 495 citing *Agins v. Tiburon*, supra at 260. See also *Penn Central*.

Although many commentators have written about investment-backed expectations and the other factors

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U.S. 470, 493 et seq.; *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Nollan*, 483 U.S. at 833, fn 2.

mentioned in the leading regulatory takings cases,[16] none have been able to discern a consistent definitional framework sufficient to place owners and regulators on notice of the consequences of their actions.

The appellate court, in this case, stated the test as "... a private landowner is entitled to compensation when a land use regulation either does not substantially advance a legitimate public purpose or deprives the landowner of 'all uses' (emphasis added) of the property."[17] citing W. Falik and A. Shimko, *The Takings News: The Supreme Court Forges a New Direction in Land Use Jurisprudence*, 23 Real Prop., Prob. & Tr. J. 1.

If this Court does not hear this case, then the law in California will be that a regulatory taking does not exist

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[16]*See, e.g.*, Rose-Ackerman, *Against Ad Hocery: A Commentary on Michelman*, 88 Colum. L. Rev. 1697 (1988) (arguing that the uncertainty created by ad hoc inquiry is detrimental to the real estate community and the economy as a whole); Epstein, *An Outline of Takings*, 41 U. Miami L. Rev. 3 (1986); Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630 (1988); Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. of Urb. and Contemp. L. 3 (1987) (concluding that the test may as well be ignored); Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600 (1988)

[17]The appellate court did enunciate the test as set forth in *Keystone* as denial of "economically viable use," however, its analysis was based on "all uses."

unless all use of property is destroyed.[18] The appellate court, as a matter of fact[19] determined that the Church was not denied all use of its property, based on the fact the Church maintained a campground, however, it operated a camp, not just a campground. At this camp were buildings to serve the needs of all its parishioners, irrespective of age or physical ability.

The appellate court, insensitive to the range of uses, held that because "camping" could still be possible (albeit very rustic camping) there was some use to the property and no taking occurred. The appellate court acknowledged that these sorts of uses would have meant little to another type of landowner, but not to the Church because it operates a campground, so uses of value to that purpose remained available after the moratorium went into effect.

Had there been a trial, permitting a more accurate and expanded record for analysis, the court may have reached a different conclusion.

The Church has been denied one of the basic rights inherent in any theory of property, the ability to make improvements and utilize land beyond its natural state. By any standard, either looking at the beneficial use of

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[18]The standard, it seems, is economically viable use, not all or reasonable use. Still confusing for private property owners and planners alike is what constitutes economically viable use.

[19]As stated by Petitioner, the appellate court did not remand the case for trial. C.A.R. is of the opinion that a trial should have been held in order for a full exposition of all the facts.

development which the government has taken away, or looking to what the owner has left - the ability to pitch tents - the Church has been substantially deprived of vested property rights. In *San Diego Gas*, Justice Brennan noted in his dissent that "[f]rom the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *Id.* at 652. Requiring the Church to keep the land in its natural state effectively denies it all beneficial use of the property.

Additionally, in his *Penn Central* dissent, now Chief Justice Rehnquist rejected the contention that a taking only occurs when the property owner is denied all reasonable return on his property. 438 U.S. at 149. Justice Rehnquist also noted that "[a] taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner some 'reasonable' use of his property." *Id.* at 149 (emphasis added).

This Court's assistance by better defining "economically viable use" and rejecting the "all use" standard is needed.

CONCLUSION

C.A.R. is of the opinion further guidance on the definition of a regulatory taking is needed from this Court. It is believed that this case is the proper vehicle for that guidance. We urge the Court to take this case.

The California appellate court attempted to thoughtfully apply the "guideposts" this Court has provided for analysis of regulatory takings. The untenable result of its analysis demonstrates the need for this Court to grant Petitioner's request.

DATED: Dec. 20, 1989

Respectfully submitted,
William M. Pfeiffer, Vice President and General Counsel
Judith K. Herzberg, Senior Counsel

By: Judith K. Herzberg
Judith K. Herzberg

No. 89-826

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

First English Evangelical Lutheran Church of Glendale,
Petitioner,
vs.
County of Los Angeles, California,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Esiquia Gonzales, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

MICHAEL M. BERGER, ESQ.
FADEM, BERGER & NORTON
Suite 900
12424 Wilshire Boulevard
Los Angeles, CA 90025

JACK R. WHITE, ESQ.
HILL, FARRER & BURRILL
35th Floor, Union Bank Square
445 South Figueroa Street
Los Angeles, CA 90071-1666

That affiant makes this service, for WILLIAM M. PFEIFFER, Counsel of Record for California Association of Realtors®, Amicus Curiae herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Esiquia Gonzales

On December 21, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore M. Wilden
Notary Public in and for
said county and state

No. 89-826

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California Corporation,

Petitioner, __

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari To The
Court of Appeal Of The State of California,
Second Appellate District, Division Seven

AMICUS CURIAE BRIEF OF JOHN K. VAN DE KAMP, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General
of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
THEODORA P. BERGER
Assistant Attorney General
CRAIG THOMPSON
Deputy Attorney General
TERRY T. FUJIMOTO
Deputy Attorney General
(Counsel of Record)
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2152

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (contd.)

Statutes and Regulations

INTEREST OF AMICUS CURIAE

Amicus respectfully file this brief in support of respondent County of Los Angeles pursuant to rule 37.5 of the rules of the Supreme Court of the United States.

The issues presented by this case are of fundamental importance to the State of California. A decision holding that the flood plain safety measures enforced by respondent herein have violated the United States Constitution would seriously impair the ability of the State and its political subdivisions to carry out their diverse police power responsibilities. Adoption of petitioner's radical reformation of takings jurisprudence would cripple amicus' ability to perform regulatory functions upon which its citizens' health, safety and welfare quite literally depend.

STATEMENT OF THE CASE

Amicus adopts respondent's Statement of the Case.

SUMMARY OF ARGUMENT

1. Facial challenges to an alleged regulatory taking may be decided on demurrer without a "factual, evidentiary inquiry" based solely upon the pleadings and judicially noticed facts. (*Agins v. City of Tiburon*, 447 U.S. 255 (1980).) Neither *Nollan* nor *First English* changes that standard.

2. The taking of judicial notice of facts for the first time on appeal does not raise due process concerns where they involve matters of common knowledge such as statutes and local ordinances. Furthermore, to the extent judicial notice of certain matters is permissible under local law, this Court is bound by that determination. Under California law, an appellate court can take judicial notice even though the facts were not presented to the trial court.

3. The Court of Appeal in addressing the takings challenge to the interim flood ordinance enacted by respondent correctly interpreted this Court's standards for determining when a regulation amounts to a taking of property.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE COURT OF APPEAL DID NOT CONTRAVENE THIS COURT'S REMAND ORDER OR VIOLATE DUE PROCESS IN DETERMINING THAT PETITIONER'S COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR AN UNCONSTITUTIONAL TAKING

Contrary to petitioner's claim, this Court did not order that there be a "factual, evidentiary inquiry" or trial to determine whether a taking occurred. Rather, this Court limited its decision solely to the remedies issue, namely, whether the Fifth Amendment requires

compensation for a regulatory taking. Indeed, this Court specifically recognized:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the County might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the state's authority to enact safety regulations. *[Citations omitted.]* These questions, of course, remain open for decision on the remand we direct today. (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 (1987).

The circumscribed nature of this Court's holding was, as the Court of Appeal observed, underscored by Justice Stevens in his dissenting opinion and was not "controverted in any way by the majority opinion." (Pet. for Writ of Certiorari, Appendix A, p. A-9; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 325-328 (1987).)

Thus, it cannot be said that this Court directed or required the Court of Appeal on remand to resolve the takings issue in any particular manner.

Furthermore, the Court of Appeal's decision to sustain the trial court's judgment on the alternative ground that the complaint failed to allege facts sufficient to state a cause of action, was wholly consistent with California rules of appellate review

which provide that a correct ruling by the trial court must be affirmed on appeal even if it is based on erroneous reasoning if there is an alternative rationale which will support the judgment. (*Keenan v. Dean*, 134 Cal.App.3d 189 (1956).) To the extent petitioner objects to the Court of Appeal's application of state law, petitioner's claim does not raise a federal question appropriate for review by this Court. (See *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 461 (1907).)

Finally, there is no merit to petitioner's assertion that judicial notice of the disputed interim ordinance by the Court of Appeal violates due process. This Court has long held that courts may take judicial notice of "matter of common knowledge" including state statutes, city charters and local ordinances. (See *Ohio Bell Tel. Co. v. Pub. Util. Commn.* 301 U.S. 292, 301; *Newcomb v. Brennan*, 538 F.2d 825, 829 (7th Cir. 1977).) To the extent judicial notice of certain matters is permitted under local law, this Court is "bound" by that determination. (*Renaud v. Abbott*, 116 U.S. 285-286 (1985).)

Under California law, courts may take judicial notice of all regulations or enactments issued by any public entity (Cal. Evid. Code, § 452(b)), and a reviewing court may take judicial notice of any matter that could have been judicially noticed by the trial court even though they were not presented to the trial court as long as the reviewing court affords each party

reasonable opportunity to present to the court information relevant to the propriety of taking judicial notice. (Cal. Evid. Code, § 455(a), 459(c); *People v. Terry*, 38 Cal.App.3d 432, 439 (1974).)

Furthermore, it is apparent that this Court saw no due process problems with the Court of Appeal taking judicial notice of the interim ordinance. Justice Stevens in his dissent in this case, without objection from any other Justice, similarly took judicial notice of the interim flood ordinance. (*First English*, *supra*, 482 U.S. at 326, fn. 6.)

Accordingly, it was entirely proper for the Court of Appeal to take judicial notice of the disputed interim ordinance and related provisions. (Pet. (Opinion) p. A-19; also see Pet. (Appendix D).)

Furthermore, the Court of Appeal's decision directly mirrored this Court's resolution of the identical issue in *Agins v. City of Tiburon*, 477 U.S. 255 (1980). In *Agins*, both the California Supreme Court (see *Agins v. City of Tiburon*, 4 Cal.3d 266 (1979)) and this Court upheld an order sustaining a demurrer to an inverse condemnation complaint despite an allegation that the zoning ordinance would "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever. . ." (*Agins*, *supra*, 447 U.S. at 259, fn. 6.) The California high court, taking judicial notice of the relevant ordinances, concluded that the enactment on its face did not deprive plaintiffs of all reasonable use since it allowed them to build between one to five

residential units on their land. (*Agins*, *supra*, 24 Cal.3d 277.) This Court in affirming the judgment, rejected the assertion that it was improper for the California Supreme Court to take judicial notice of the zoning ordinances.

This Court reasoned that under California law, judicial notice of local ordinances was permissible and that the State Supreme Court "merely rejected allegations inconsistent with the explicit terms of the ordinance under review." (*Agins*, *supra*, 477 U.S. at 259, fn. 6.)

Here, as in *Agins*, the sole purpose of taking judicial notice of the disputed ordinances was to "compare the express terms of the [regulations] with the factual allegations in the complaint." (*Agins*, *supra*, 477 U.S. at 259, fn. 6; Pet. (Opinion), p. A-19.) On that basis, the Court of Appeal, properly sustained the judgment of the trial court.

Neither of the two cases cited by petitioner are applicable to the circumstances here or compel reversal of the judgment below. (E.g., *Ohio Bell Tel. Co. v. Pub. Util. Commn.*, 301 U.S. 292 (1937); *Garner v. Louisiana*, 368 U.S. 157 (1961). *Garner* and *Ohio Bell* merely stand for the self evident proposition that appellate courts may not judicially notice facts which are properly in dispute and the province of the trier of fact. Furthermore, both cases are clearly distinguishable on other grounds as well. (See Respondent's Brief in Opposition, pp. 18-19.)

II

THE OPINION OF THE COURT OF APPEAL CORRECTLY INTERPRETED AND APPLIED THE DECISIONS OF THIS COURT RELATING TO THE STANDARD OF REVIEW FOR DETERMINING WHETHER A REGULATORY TAKING HAS OCCURRED

A. The Court of Appeal Did Not Ignore This Court's Guidance for Remand

Petitioner argues that the Court of Appeal in concluding that no taking has occurred, relied solely on the public safety justification for the enactment and failed to adequately address whether the ordinance provided petitioner economically viable use of its property. Thus, petitioner asserts that the Court of Appeal's conclusion cannot be reconciled with this Court's view that the "purpose of the Just Compensation Clause . . . is to require government to compensate for property taken in the course of 'otherwise proper' interferences." (Pet., p. 13.)

Contrary to petitioner's claim, the Court of Appeal did not ignore this Court's pronouncements, it simply concluded after a comparison of the terms of the flood safety measure and the allegations of the complaint that petitioner was not entitled to compensation because the interim ordinance did not work a taking of property. (Pet. (Opinion), p. A28.)

B. The Court of Appeal Properly Interpreted And Applied the Public Safety Exemption In the Context of Takings Analysis

Petitioner also contends the court below misapplied the "public safety" or "nuisance" exception line of cases exemplified by this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1897) and more recently in *Keystone Bituminous Coal Ass'n. v. De Benedictis*, 480 U.S. 470 (1986).

Specifically, petitioner asserts that the "extent of the use prohibition approved the Court of Appeal in this case goes beyond anything this court has ever countenanced" (Pet., p. 18) and accuses the Court of Appeal of applying the public safety exception in a manner which would "preclude all reasonable use of First Church's property without compensation." (Pet., p. 18.) The fallacy of this argument is, as respondent aptedly observed, that it rests on a "patently false premise." (Respondent's Brief in Opposition, p. 21.) The Court of Appeal specifically found, contrary to petitioner's contention, that the interim flood safety ordinance did not deprive First English of "all use" of its property. (Pet. (Opinion), pp. A18, A24.)

Furthermore, there is nothing in the Court of Appeal's opinion which even remotely suggests that the court misconstrued or misapplied the public safety or "nuisance" exception.

On the contrary, the Court of Appeal recognized, as did this Court in *Mugler* and *Keystone*, that a

"prohibition simply upon the use of property for purposes that are declare by valid legislation, to be injurious to the . . . safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." (*Mugler, supra,* 123 U.S. 668-669; Pet. (Opinion), p. A11.) This Court, in reaffirming *Mugler*, observed that the "special status of this type of state action can also be understood on the simply theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has no 'taken' anything when it asserts its power to enjoin the nuisance like activity." (*Keystone, supra,*, 480 U.S. at 491, fn. 20.)

In the present case, this Court has acknowledged that even assuming the ordinance in question denied petitioner all use of the property, it may still be "insulated as part of the state's authority to enact safety regulations." (*First English, supra,* 482 U.S. at 313.)

The decision of the Court of Appeal below was entirely consistent with these principles. (Pet. (Opinion), pp. A16-A24.)

In any event, the Court of Appeal in rejecting the takings claim did not rely solely on the public safety exception. Here as in *Keystone, supra,* 480 U.S. at 492-493, the Court of Appeal found that the safety ordinance besides being insulated as part of the State's authority to enact safety regulations, did not deprive petitioner of all use of its property. (Pet. (Opinion), pp. A18, fn. 10, A25.)

Petitioner seeks to distinguish *Mugler* and the present case on the ground that the former involved a specific use of property which this Court held could be prevented because it constituted a nuisance. (Pet., p. 19.) In fact, there is little difference between the application of the public safety exception in *Mugler* and here. Here as in *Mugler*, the safety ordinance under review only prohibited, temporarily, a specific hazardous use of property, namely, the reconstruction of buildings in a flood prone area. (Pet. (Opinion), p. A18.)

C. The Court of Appeal Applied the Proper Test in Rejecting Petitioner's Facial Challenge to the Interim Safety Ordinance

Petitioner asserts that the Court of Appeal "ignored" this Court's standards for determining whether a regulation effects a taking of property. (Pet., pp. 16, 18.) This contention is as respondent noted "patently frivolous." (Respondent's Brief in Opposition, p. 24.)

Because petitioner's taking claim in the present case arose in the context of a "facial" challenge of the ordinance, the sole question was whether the "mere enactment" of the flood safety provision constitutes a taking. (*Keystone, supra,* 480 U.S. at 495.) The test to be applied in considering a facial challenge is whether the ordinance fails to substantially advance legitimate state interest or denies petitioner economically viable use of his land. (*Agins, supra,* 447 U.S. at 260.) The Court of Appeal here in explicitly applying the *Agins* formulation, determined that the petition failed to state

a cause of action for an unconstitutional taking precisely because the interim ordinance in question "substantially advanced the preeminent state interest in public safety and did not deny petitioner all use of its property." (Pet. (Opinion), p. A2, A18.)

Petitioner, although acknowledging that the court below "mentions" the *Agins* test, asserts that there is no way, without a trial, that any court can "determine whether the County's regulation permitted 'economically viable use or not." (Pet., p. 12.) Petitioner overlooks the fact that this Court in *Agins* applied the two-pronged *Agins* test based solely upon the pleadings and judicially notice provisions of the disputed ordinance in disposing of a facial takings challenge. (*Agins,* 447 U.S. at 259, fn. 8.)

Lastly, the Court of Appeal did not err in failing to apply the "reasonable investment backed expectations" test. (See Pet., p. 16.) First, the test applies only where there is an "as applied" challenge to an alleged regulatory taking. (*Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 294-296 (1981). In contrast, this case involved a facial attack on the ordinance under review. Secondly, petitioner failed to allege any fact which would demonstrate how the interim ordinance could have interfered with any reasonable investment back expectation interest. Indeed, as Justice Stevens points out in his dissent in this case, in light of the tragic flood and loss of life that precipitated the safety regulation "it is hard to

understand how [petitioner] ever expected to rebuild on Lutherglen." (*First English,* 482 U.S. at 327-328.)

D. The Court of Appeal Did Not Misconstrue or Misinterpret Nollan

Petitioner also argues that the Court of Appeal failed to apply the "heightened standard of judicial review" this Court adopted in *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825 (1987) for determining whether a land use regulation substantially advances a legitimate state interest. (Pet., pp. 25-28.)

The argument fails for two reasons. This Court in *Nollan* made clear that heightened scrutiny was intended to apply only where the "actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective." (*Nollan, supra,* 483 U.S. at 841.)

Here, unlike *Nollan*, the petitioner did not allege that the limitation imposed was motivated by a desire to acquire Lutherglen at a lower price. (Pet. (Opinion), p. A25.) On the contrary, the flood ordinance was clearly a legitimate safety regulation and not intended as a means to circumvent compensating petitioner for the loss of property; petitioner concedes as much.

Justice Stevens points out in his dissent, the "legitimacy of the County's interest in the enactment of [the flood ordinance] is apparent from the face of the

ordinance and has never been challenged." (*First English, supra,* 482 U.S. at 326-327.)

Furthermore, the conveyance of a property interest present in *Nollan* is not apparent here. Thus, application of the heightened scrutiny test in this case is neither appropriate nor compelled by *Nollan.*

Secondly, the Court of Appeal, in fact, recognized that *Nollan* reflected a "refinement" of the *Agins* test and expressly held that under *Nollan* "there can be no serious contention" that the safety ordinance failed to substantially advance the precise legitimate state interest. (Pet. (Opinion), pp. A16, A25.)

Petitioner also claims that the Court of Appeal ignored this Court's language in *Nollan* that property owners have a right to build on their own property subject to reasonable regulation. (Pet., p. 24.) This argument, as with petitioner's other claims, is without merit.

The crux of petitioner's contention is that the right to build is an identifiable and separable property interest for takings purposes and thus the prohibition of new development imposed by the County's flood measure deprived it of all economically viable use of its land. There is nothing in *Nollan* or any other decision of this court which compels such a result. To the contrary, the right to build is merely one strand in the bundle of property rights. Where an owner possesses a full bundle of rights, the destruction of one strand is not a taking because the aggregate must be viewed in

its entirety. (*Andrus v. Allard*, 444 U.S. 57, 65-66 (1979).)

As this Court explained in *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-131 (1978):

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole. . . .

Thus, here as in *Andrus* and *Penn. Central*, the flood ordinance does not deprive petitioner of all economically viable use of its land, it merely removes one strand from the Church's bundle of rights. Petitioner still retains the ability to use the property in any number of viable ways which are reflected in the Court of Appeal's decision below. (Pet. (Opinion), p. A18-A24.)

Lastly, *Nollan* does not provide, as petitioner contends, that one has a constitutional right to build on his property if to do so would create a potential risk of harm to the public. (See *Mugler, supra*.) If the rule were otherwise, as respondent observed, "all building and safety codes would be invalid." (Respondent's Brief in Opposition p. 27.) Accordingly, the Court of

Appeal in this case did not misconstrue or misapply this Court's decision in *Nollan*.

In short, petitioner raises no issues which demand this Court's attention. The sole question is whether the Court of Appeal below faithfully followed this Court's settle precedents in determining whether the ordinance under review amounted to a taking of property. As shown, the court acted properly. Therefore, review by this Court is neither necessary or appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: January 4, 1990

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
THEODORA P. BERGER
Assistant Attorney General
CRAIG THOMPSON
Deputy Attorney General
TERRY T. FUJIMOTO
Deputy Attorney General
(Counsel of Record)
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2152

Attorneys for Amicus Curiae

DECLARATION OF SERVICE

State of California)
) ss.
County of Los Angeles)

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles. I am over the age of 18 years and not a party to the within action; my business address is 3580 Wilshire Boulevard, Los Angeles, California.

On January 5, 1990, I served the within Amicus Curiae Brief of John K. Van de Kamp, Attorney General of the State of California in Opposition on all parties by placing three true copies thereof enclosed in sealed envelopes, with postage thereon fully prepaid, in the United State Post Office mail box at Los Angeles, California, addressed as follows:

Michael M. Berger
Fadem, Berger & Norton
12424 Wilshire Boulevard
Los Angeles, CA 90025

Jack R. White
Hill, Farrer & Burrill
445 South Figueroa Street
35th Floor, Union Bank Bldg.
Los Angeles, CA 90071

DeWitt W. Clinton
County Counsel
Charles J. Moore
Prin. Deputy County Counsel
500 West Temple Street
Los Angeles, CA 90012

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 1990, at Los Angeles, California.

Josephine D. Rose
Declarant

JOSEPHINE D. ROSE

89-[redacted]

89-826

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, A CALIFORNIA CORPORATION,

Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division Seven

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

RALPH W. HOLMEN
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

APP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, A CALIFORNIA CORPORATION,

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COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division Seven

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER*

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of approximately 800,000 persons engaged in all phases of the real estate business.

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* All parties of record in this case have consented pursuant to Supreme Court Rule 36.1 to the filing of this *amicus curiae* brief in support of Petitioner. These consents are filed herewith.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of the significant problems encountered by property owners for over three quarters of this century.

Of the problems which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

INTEREST OF AMICUS

NAR's longstanding and vigilant concern for the preservation of private property rights compels its attention to the threat presented by the decision of the court of appeal in this case to property owners and property ownership nationwide. At stake is the protection afforded property owners by the Fifth and Fourteenth Amendments to the United States Constitution against the uncompensated "taking" of their property, and the corresponding

rights and benefits of property ownership. The decision below, unless remedied by this Court's review, will substantially if not entirely undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is particularly able to recognize the gravity of this threat. Not only does its membership span the entire nation, but these members are involved in upwards of 80% of real property resale transactions. This comprehensive involvement at the grassroots level of land development, investment and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of Constitutionally protected property rights.

NAR does not propose to duplicate the legal arguments presented in the Petition for Writ of Certiorari. The facts in this case and its history are well-known, and NAR endorses and urges to this Court the Statement of the Case and legal arguments set forth in the Petition. The purpose of NAR in submitting this brief *amicus curiae* is to add the voices of the hundreds of thousands of NAR members and the millions of American property owners they serve to the chorus of others concerned with the devastating effect of the decision of the court below on the private property rights guaranteed by the Constitution.

INTRODUCTION

American property owners breathed a collective sigh of relief when in 1987 this Court issued its' opinion in the first appearance of the present case before this Court, *First English Evangelical Lutheran Church v. County of*

Los Angeles, 482 U.S. 304 (1987) ("*First English I*"), which held that compensation must be paid for temporary regulatory takings. That decision meant that governments could no longer prohibit or limit the use of property without risk of liability for payment of compensation if such regulation was deemed excessive and therefore a "taking" under the Fifth Amendment. This Court carefully limited that decision to the remedial question of whether a suit for compensation must be allowed or whether a property owner could be relegated to a suit seeking invalidation of an alleged regulatory taking, and did not address the nature of regulation which constitutes a compensable taking. Nevertheless, it was widely believed that that decision would cause regulators to more conscientiously consider whether proposed regulatory prohibitions on property use might constitute compensable takings, so as to avoid them or provide compensation therefor.

If the decision below is illustrative of the protection to be afforded property owners under *First English I* and this Court's other precedents, then that belief was badly misguided. The decision of the court of appeal distorts the clear language of this Court's opinion in *First English I*, is based on the court's speculation and hypothesis rather than facts established at trial, and relies on an incorrect and heretofore unrecognized test for determining when a regulation does, in fact, constitute a taking. As a consequence of these flaws, the decision below provides a graphic example of the inefficacy of this Court's reliance on an "ad hoc" approach to determining when regulatory action constitutes a compensable taking, rather than a precise formula capable of producing consistent and predictable results. More significantly, adoption by other courts of the principles inherent in the decision below will essentially eliminate the protection provided property owners by the Fifth Amendment's Just Compensation Clause.

NAR urges this Court to issue the Writ of Certiorari sought by Petitioner to rectify the injustice which the decision below works on Petitioner, to declare that the court of appeal has manifestly misunderstood and misapplied this Court's precedents, to provide both property owners and regulators alike a comprehensible formula for determining regulatory takings which violate the Fifth Amendment, and, most importantly, to restore vitality and meaning to the Just Compensation Clause of the Fifth Amendment.

ARGUMENT

I.

THE COURT OF APPEAL INCORRECTLY APPLIED THE "PUBLIC SAFETY EXCEPTION" TO THE PROHIBITION AGAINST UNCOMPENSATED TAKINGS.

The court of appeal correctly recognized that certain uses of property can be prohibited without the prohibition being deemed a compensable taking. Such uses are those which are so injurious or offensive to the public health, safety or welfare that the owner cannot be said to have a "right" to use his property in such a noxious fashion, and therefore prohibiting such use cannot be a deprivation of any property right. This Court has established that principle in such cases as *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Mugler v. Kansas*, 123 U.S. 623 (1887), and reaffirmed its' viability most recently in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

Rather than applying this well-recognized principle simply to prohibit uses which are patently harmful to the

public well-being, however, the court of appeal employs it in a manner which has the effect of insulating essentially any regulatory prohibition on property use from challenge as a taking if it arguably advances any public interest. This result follows directly from the fact that the court's conclusion is founded on a "record" consisting merely of the allegations contained in Petitioner's complaint and the judicial notice which the court takes of the challenged ordinance itself. Thus, under the court's extraordinarily deferential approach, a regulation need not even address a genuine threat to the public weal or be carefully devised to prevent or mitigate that harm, so long as the regulation *recites* the identity of the perceived threat and that the purpose of the regulation is to abate it.

In this case, the court accepted the validity of the flood hazard safety concerns of Respondent county, and accepted Respondent's view that a prohibition on building in the area which includes Petitioner's property was necessary and would be effective to shield the public from that hazard. Because the court did not order a trial to determine the facts in this case, however, those conclusions were not based on factual evidence offered by Respondent, nor was Petitioner offered the opportunity to contest those factual conclusions. The court's superficial approach allows the "public safety exception" to be judged applicable in a given case based on facts assumed by the court, rather than those alleged and proven by the regulator.[1]

[1] The "public safety exception" is a justification advanced by a regulatory body in defense to a claim that a regulation or ordinance constitutes a taking. Thus, it should be pleaded and proven by the regulatory body asserting that defense. A property owner claiming that an ordinance constitutes a taking is should not be required to specifically plead and prove the *absence* of such a justification for the ordinance.

Elimination of a property owner's opportunity to challenge either the presence of a genuine public injury to be alleviated by a regulation, or the capability or necessity of the particular regulation to accomplish that purpose, is, of course, grossly unfair. While NAR concurs with the court that the preservation of life ranks at or near the top of the public interests to be served by the police power, even that interest should not be served at the expense of property owners' rights to use their property when the need for and effectiveness of limitations imposed on those rights are factually unsupported.[2]

More significantly, however, this application of the "public safety exception" to alleged regulatory takings will allow regulators to conveniently, uniformly and consistently defeat all challenges to ordinances as takings, and therefore will eliminate the risk of their ever having to pay just compensation for imposing a regulation which "goes too far." A clever regulatory body need simply identify, when adopting an ordinance limiting the use of property, a perceived injury to the public well-being to be deterred or eliminated by the ordinance, and indicate that the ordinance is intended to mitigate or alleviate that injury. A court considering a subsequent challenge to that regulation as a taking could, following the court of appeal's precedent in this case, simply accept the government's regulatory justification, and dispense with the inconvenience of subjecting such justification to scrutiny at trial. Such extraordinary and blind deference to the legislative or regulatory body, particularly when all or even a substantial

[2] Whether this exception goes so far as to permit denial "all use" of property to prevent a public injury, where facts adduced at trial actually establish the spectre of such injury and the effective elimination of it by prohibiting all use of the property, is a separate question, not raised by the posture of this case.

measure of Constitutionally protected property rights are at stake, should not be tolerated.

Perhaps the most revealing illustration of the court of appeal's failure to understand and apply this Court's direction in *First English I*, and the corresponding failure of the court to decide the case on facts, is the manner in which the court takes out of context, and thus badly distorts, this Court's language in *First English I*. In order to indicate the narrow scope of its holding, this Court said:

> [W]e accordingly have no occasion to decide whether the ordinance at issue actually denied (Petitioner) all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. . . . *These questions, of course, remain open for decision on the remand we direct today.*

First English I, at 313 (emphasis added).

That language plainly imposes on "the county (the burden to) *avoid* the conclusion that a compensable taking had occurred by *establishing*" the applicability of this public safety exception. Because the court of appeal did not require the county to carry this burden at trial, however, the court considers these questions without the benefit of any factual foundation. The court justified its conclusion by manipulating the above-quoted language to appear as if it were this Court's affirmative statement:

> In the words of Chief Justice Rehnquist, the ordinance did not 'actually [deny] (Petitioner) all use of its property' and in any event 'the denial of all use was insulated as a part of the State's authority to enact safety regulations.

First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893, 905-06 (1989).

Unless condemned by this Court on review, other courts will similarly be tempted, or perhaps even encouraged, to apply a similar *per se* rule to other legislative or regulatory limitations on the use of property, thereby allowing regulators to sidestep the claim that such limitations are prohibited uncompensated takings of property by asserting the State's authority to enact safety regulations. This Court should grant the Writ sought by Petitioner to declare such that no such *per se* rule applies, and to confirm that owners of property affected by such limitations must have the opportunity to demonstrate that the purported menace to public safety is not genuine, or that the limitation or prohibition on property use is ill-suited to prevent that harm.

II.

THE COURT OF APPEAL INCORRECTLY DETERMINED THAT NO TAKING HAD OCCURRED BECAUSE ALL USE OF PETITIONER'S PROPERTY HAD NOT BEEN DENIED.

As an independent basis for rejecting Petitioner's claim for compensation for the taking of its property by Interim Ordinance 11,855, the court of appeal concluded that Petitioner had not been denied "all use" of the property. In doing so, the court of appeal makes two fundamental errors which require this Court's review and correction.

First, the court incorrectly asserts that no taking has occurred and thus no compensation is necessary because Petitioner was not denied "all use" of its property. This Court has never held that denial of *all* use is the proper test of whether a regulation constitutes a taking. Significantly, the court relies on a law review article, rather than any decision of this Court (or any other court), for its novel and unprecedented view of what constitutes a

taking.[3] For this reason alone the court's decision is plainly flawed and this Court should grant the Writ to correct it.

Second, even assuming that the court's "denial of all use" test for a taking was correct, the court's analysis of that factual question suffers from the same critical defect as its application of the "public safety exception." The court denies Petitioner the chance to establish at trial facts demonstrating that the property is not, in fact, suitable for the other uses which the court postulates, or any others. Rather, the court substitutes its own speculation regarding other uses of the property which might be enjoyed by Petitioner, and concludes that the hypothetical availability of such other uses is adequate to defeat Petitioner's claim that the property has been taken.

It is, for example, conceivable, and perhaps even likely, that the remaining permissible uses which the court envisions ("many camping activities . . . meals could be cooked, games played, lessons given, tents pitched . . . ," 210 Cal. App. 3d ____, 258 Cal. Rptr. at 902) are no longer

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[3] Falik and Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence*, 23 Real Prop., Prob. & Trust L.J. 1 (1988). Further evidencing the court's misplaced reliance on this authority, the article itself relies on *Agins v. City of Tiburon*, 447 U.S. 255 (1980), simply for the familiar proposition that to be a taking a regulation must only "den(y) an owner economically viable use of his land," *Id.*, at 4, rather than concluding that "all use" of the property must be denied, as the court below asserts. Indeed, the article relied on by the court expressly *rejects* the interpretation the court derives from it: "[T]o adopt the standard that all use of property must be eliminated for a regulation to be regarded as invalid, the court would need to ignore years of jurisprudence indicating that a taking can be found if a property owner was denied all *reasonable, economically viable* use of its property." *Id.*, at 43 (emphasis in original).

feasible because of the condition of the property after the flood. Surely conclusions regarding permissible uses of the property which genuinely remain are conclusions of *fact* which require trial to determine.[4]

To be sure, the court's conclusion—that the property may still be used in the manner described and that such uses are likely to be valuable and beneficial to Petitioner—has a certain logical appeal. But such logic must be supported by facts, which must be developed at trial and examined in the specific context of the nature of the property, the property owner and the particular uses still permitted, rather than on the musings of the court. This Court's review and rejection of the conjectural analysis of the court of appeal is therefore necessary if owners of property are to enjoy any meaningful protection under the Fifth Amendment's Just Compensation Clause. If indeed courts may conclude that deprivation of an owner's right to use his property in certain ways does not constitute a taking because the *court itself* can *imagine* some other uses for the property, then the Fifth Amendment's prohibition against uncompensated regulatory takings, as construed by *First English I* and this Court's other precedents, is truly emasculated.

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[4] The court even suggests that the utility of particular permissible uses of the property are to be considered in light of the nature and identity of the property owner when it notes that "(I)f (the property) had been a factory or a coal mine, these sorts of (outdoor recreational) uses would have meant little to the landowner. But (the property) is a camping facility. So uses of value to that purpose remained available. . . ." 210 Cal. App. 3rd at ____, 258 Cal. Rptr. at 902. If it is indeed proper to determine the nature and viability of any remaining permissible uses of a regulated property based on the value of those uses to the *particular* owner, that question is quite obviously one of *fact*, and thus *not* appropriate for an appellate court to decide, as did the court here.

The court of appeal and other courts tempted to follow that court's lead must be instructed that a regulatory scheme need not deny "all use" of a property to constitute a taking and that this Court has never so held, and that judicial speculation regarding the existence and value of uses theoretically remaining available to a property owner may not be used in place of facts placed in evidence. To insure that the Fifth Amendment's guarantees have continuing vitality for property owners, this Court should issue the Writ sought by Petitioner.

III.

THIS COURT'S REVIEW IS NECESSARY TO CLARIFY AND CONSOLIDATE THE MYRIAD OF FORMULATIONS EMPLOYED FOR IDENTIFYING COMPENSABLE TAKINGS.

The errors of the court of appeal described above, as well as those articulated in the Petition itself, without more, demonstrate the critical necessity for this Court to issue the Writ sought by Petitioner. The mere existence of these defects in the court of appeal's analysis, as well as the extensive scholarship addressing "takings" jurisprudence[5], suggest a more fundamental problem: The criteria which this Court as well as lower courts have heretofore used to determine if a compensable taking has occurred are simply inadequate for that purpose. Such multiple criteria permit courts to reach inconsistent and unpredictable results, which is hardly what one expects, or what American property owners deserve and require, from a principle of Constitutional law. This Court's attention to

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[5] See, e.g., the opinion of the court of appeal below, n.7, 210 Cal. App. 3d ____, 258 Cal. Rptr. at 897, and the list of publications identified in the Petition itself, pp. xii-xv.

this problem is therefore necessary to bring order to the manner in which courts henceforth resolve this critical Constitutional question.

It is often noted, for example, that this Court has acknowledged that "[T]he question of what constitutes a 'taking' for Fifth Amendment purposes has proved to be a problem of considerable difficulty . . . . (for which no) 'set formula' " has been developed, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24 (1978), and a question which can only be resolved by engaging in "ad hoc, factual inquiries" in each case, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Indeed, this confusing state of affairs is reminiscent of the Chief Justice's characterization of this Court's First Amendment decisions applicable to billboard regulation as "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

A variety of tests have heretofore been applied by this Court to the takings question, including, for example, the following:

1. Whether the ordinance denies the owner the opportunity to pursue any "economically viable use," *Agins v. City of Tiburon*, 447 U.S. at 260;
2. Whether the ordinance precludes or interferes with the owner's "reasonable, investment-backed expectations," *Penn Central*, 438 U.S. at 124;
3. Whether the ordinance fails to advance legitimate state interests, *Agins*, 447 U.S. at 260;
4. Whether the ordinance denies the owner the opportunity to "secure an average reciprocity of advantage", *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922);

5. Whether the ordinance results in a physical occupation of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 411, 433 (1982);
6. Whether the ordinance destroys a "major portion" of the property's value, *First English I*, 482 U.S. at 329 (Stevens, J., dissenting).

There is also the "either/or" test applied by the court below in this case, that is, whether the ordinance fails to "substantially advance a legitimate public purpose *or* deprives the landowner of 'all use' of the property," 210 Cal. App. 3d ____, 258 Cal. Rptr. at 901, although as discussed above, *supra*, pp. 9-10, the latter prong of that test is supported by neither this Court's precedents or even the authority which the court itself relies on.

Of course, each of these tests is not wholly distinct from the others, and a particular ordinance may reasonably be judged to be (or not to be) a taking under more than one. Nevertheless, because the tests are not congruent, the result in a particular case often will depend on the test(s) selected. That this Court has found it necessary or desirable to articulate such a multiplicity of tests, however, reveals that any one of these tests is incapable of producing a satisfactory and proper result in all cases. NAR therefore urges this Court to issue the Writ of Certiorari sought by Petitioner in order to undertake a renewed effort to develop a coherent and uniformly applicable formula for determining when a regulation is a "taking," despite the obvious and considerable difficulty which this Court has previously encountered in doing so. Even a consolidation of this plethora of approaches to the identification of regulatory takings, without achievement of the optimal objective of developing a single, comprehensible test,

would be of extraordinary value to both property owners and governmental bodies charged with the authority or duty to regulate the use of property. Regulators will benefit by being better able to avoid the unintentional adoption of ordinances which constitute takings, and thus to avoid the obligation to pay compensation to owners of properties taken by such ordinances. Property owners will benefit by gaining a better understanding of the types of ordinances which can reasonably be challenged as takings, and those which cannot. And finally, both owners and regulators will benefit from a diminished need to litigate the question of whether a particular ordinance constitutes a "taking," since they will be able to more reliably determine *in advance* the probable result of such litigation. Thus, perhaps the "great deal of litigation" feared by Justice Stevens as a result of *First English I*, 482 U.S. at 322, can be avoided.

CONCLUSION

The decision of the court of appeal utterly fails to grasp the meaning of this Court's holding in *First English I* and other cases involving regulatory takings. In light of the significance and the renown of *First English I*, however, the holding of the court below undoubtedly is and will continue to be regarded by other courts as an important statement about the meaning of the Just Compensation Clause as applied to regulatory takings. Thus, the fundamental flaws contained in that decision will, unless this Court acts, be multiplied manyfold. American proper-

ty owners cannot and should not be required to tolerate the appropriation of their rights which will result.

For the foregoing reasons, NAR urges this Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

RALPH W. HOLMEN
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

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